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Nos. 514 and 530.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

PAN AMERICAN PETROLEUM CORPORATION ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

HUMBLE OIL & REFINING COMPANY, ET AL.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES

VOL. I.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1937.

No. 514.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

PAN AMERICAN PETROLEUM CORPORATION, APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

COLIN C. BELL AND WM. TRACY ALDEN, TRUSTEES OF THE ESTATE OF THE CELOTEX COMPANY, APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

GREAT SOUTHERN LUMBER COMPANY, BOGALUSA PAPER COMPANY, INCORPORATED, APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

STANDARD OIL COMPANY OF LOUISIANA, APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 530.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

HUMBLE OIL & REFINING COMPANY, APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

MAGNOLIA PETROLEUM COMPANY, APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE TEXAS COMPANY (HOUSTON PLANT), APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

GULF REFINING COMPANY, APPELLEE.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE TEXAS COMPANY (PORT ARTHUR AND PORT NECHES PLANTS), APPELLEE.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES

PART I.

OPINION IN THE COURT BELOW.

These cases were heard and decided by a statutory Court composed of Honorable Rufus E. Foster, Circuit Judge, and Honorable Wayne G. Borah and Honorable T. M. Kennerly, District Judges, sitting in the two districts. The opinion delivered by said Court will be found reported in *Pan American Petroleum Corporation* v. *United States, et al.,* and eight other cases, 18 F. Supp. 624. It appears in the record herein. (R. 160)

COUNTER-STATEMENT OF THE CASE.

Appellees do not accept as accurate or complete the statement of the case set forth in opening brief for appellants and in particular submit that many recitals therein, particularly concerning "the Commission proceeding" and the underlying history of the subject matter, are neither justified by the record nor properly germane to the questions now before the Court.

These are direct appeals by the United States and the Interstate Commerce Commission from final decrees entered by a statutory court of three judges sitting in the Eastern District of Louisiana and the Southern District of Texas. There were nine separate causes, all of which were taken on final hearing at one time; but two separate records were made in the two districts; there were two separate, although similar, findings of facts (R. 171, 559) and conclusions of law (R. 175, 562) entered; and two separate appeals were prayed and allowed. (R. 513, 690) All of the causes were disposed of in one opinion. (R. 160) It does not appear that the appeals have been consolidated by this Court, although there could be no objection thereto.

The various appellees are (a) six petroleum refiners, whose refineries are situated at Destrehan and North Baton Rouge, Louisiana, and at or near Baytown, Chaison, Houston and Port Arthur, Texas; (b) manufacturers of lumber and paper, including related materials, with plants at Bogalusa and Marrero, Louisiana.

The various railroads serving the plants of appellees, instead of themselves doing the conventional work of switching and spotting cars at the loading points, employed the several appellees to do this work and published (with one exception stated below) in tariffs filed with the Commission, specific allowances out of the established freight rates, as authorized in paragraph (13) of Section 15 of the Act. The services for which such allowances were published are specifically described in the tariffs, of which the following tariff[1] is representative, *our italics:*

> "Terminal Allowances to the Mexican Petroleum Corporation of Louisiana at Destrehan, La.
>
> On traffic to and from points on or reached via The Yazoo and Mississippi Valley Railroad Company or connections.
>
> On all carload shipments (including trap cars containing 10,000 pounds or more of less-carload freight) destined to or coming from the plant of the Mexican Petroleum Corporation of Louisiana at Destrehan, La., *the terminal switching service is performed by the Mexican Petroleum Corporation of Louisiana for account of The Yazoo and Mississippi Valley Railroad Company. Such terminal switching service, for which this allowance is made, consists of the handling of the cars between the point of interchange of such cars with this Company and the point at which such cars are unloaded, or the point at which such cars are loaded in said plant.*

---

1 Quotation is from the tariff in No. 314 below providing allowance to the Mexican Petroleum Corporation of Louisiana, Inc., now the Pan American Petroleum Corporation, its successor, and this tariff is in evidence (R. 454) and is set out in full in the opinion of the court below. (R. 162)

> For such terminal service performed for The Yazoo and Mississippi Valley Railroad Company by the Mexican Petroleum Corporation of Louisiana, at Destrehan, La., the Mexican Petroleum Corporation of Louisiana will be allowed 90 cents per loaded car, which will include the handling of the empty cars in the reverse direction.
>
> *This allowance is not in excess of the average actual cost of the service as disclosed in a joint study* of the operations of the plant facility made during period June 4, 1929, to June 8, 1929, inclusive, also June 10, 1929, and filed with the Interstate Commerce Commission."

In the one exception, parenthetically referred to above, the allowance paid to the Great Southern Lumber Company at its Bogalusa sawmill was not provided for in a published tariff; it was a lump sum monthly payment in reimbursement of wages of crew, and various items of engine cost (R. 354); and it was condemned by the Commission because not published in a tariff. (R. 91) The carrier immediately complied with the Commission's order (R. 143) by filing a tariff publishing a specific allowance per car.[2] (R. 507)

The Interstate Commerce Commission conducted an extended and nation-wide investigation in a proceeding known as Ex Parte 104, *Practices of Carriers Affecting Operating Revenues or Expenses, Part II Terminal Services,* which it had instituted on its own motion by order entered July 6, 1931. Upon a voluminous record,[3] the Commission entered a broad main report, (usually

[2] Upon this feature, while the Commission's order has been accepted and complied with, (R. 143), the case is not moot because the Commission's order further prohibits the performance of the switching and spotting services at Bogalusa by the carrier or at the carrier's expense.

[3] The entire record of testimony before the Commission, reprinted in twelve volumes, together with the exhibits, comprising five additional volumes, was received in evidence by the court below and transmitted to this Court as originals under stipulations of counsel. (R. 511, 557, 691) References made herein to such original printed record are indicated "Or. Tr.". and in distinction, the references to the regular printed record in this Court are noted as "R.".

cited as *Propriety of Operating Practices, Terminal Services,* 209 I. C. C. 11), wherein the general facts were reviewed and conclusions announced as to the practices which the Commission regarded as proper with respect to terminal deliveries and spotting services. No order was attached to this report. Subsequently the Commission issued some 55 separate supplemental reports, to which orders were attached, dealing with the situations at individual industrial plants. These included the following reports affecting the appellees:

Mexican Petroleum Corporation of Louisiana, Incorporated, Terminal Allowance, 209 I. C. C. 394.

Celotex Company Terminal Allowance, 209 I. C. C. 764.

Great Southern Lumber Company—Bogalusa Paper Company Terminal Allowance, 209 I. C. C. 793.

Standard Oil Company of Louisiana Terminal Allowance, 209 I. C. C. 68.

Humble Oil & Refining Company Terminal Allowance, 209 I. C. C. 727.

Magnolia Petroleum Company Terminal Allowance, 209 I. C. C. 93.

Texas Company Terminal Allowance at Houston, Tex., 209 I. C. C. 767.

Gulf Refining Company Terminal Allowance, 209 I. C. C. 756.

Texas Company Terminal Allowances at Port Arthur, Tex., 213 I. C. C. 583.

Orders were attached to each of the foregoing supplemental reports requiring cessation of allowances to the respective appellees, and in some cases, cessation by respondents of any switching service without additional charge. Appellees filed their separate petitions in the courts below to set aside these orders and after hearings

on applications for interlocutory injunctions, which were granted, and subsequent final hearings on the merits, the court below entered its decrees setting aside the orders of the Commission as not within its authority to enter, for failure to state essential jurisdictional findings and for lack of any substantial evidence to support such findings.

The ultimate question presented on appeal is whether the lower court erred in holding that the Commission's orders were invalid.

MEMORANDUM OF POINTS AND AUTHORITIES.

I.

The decrees of the court below are correct and should be affirmed.

The decrees of the statutory court (R. 167-170, 563, etc.), are within the jurisdiction of that court under Section 45, Title 28, U. S. Code. These decrees are supported by findings of fact (R. 171, 559, 590, etc.) and conclusions of law (R. 175, 562) entered by the court. These findings of fact are in accordance with the record before the court, which comprises the essential record before the Commission including all of the testimony and exhibits taken by the Commission.

II.

The carriers' obligation under their published freight rates includes the service of placing cars at points reasonably convenient and accessible for loading and unloading, whether on public team tracks or on private sidetracks.

Such placement services are *transportation,* under the statutes and reported cases.

Sec. 1, par. (3) of Interstate Commerce Act.

Sec. 6, par. (1) of said Act.

Propriety of Operating Practices, Terminal Services, 209 I. C. C. 11, 44.

Car Spotting Charges, 34 I. C. C. 609.

Associated Jobbers of Los Angeles v. *A., T. & S. F. Ry. Co.,* 18 I. C. C. 310.

Interstate Commerce Commission v. *Atchison, T. & S. F. Ry. Co.,* 234 U. S. 294, 58 L. Ed. 1319.

Union Lime Company v. *Chicago & Northwestern Ry. Co.,* 233 U. S. 211, 58 L. Ed. 924.

Mitchell Coal & Coke Co. v. *Pennsylvania R. Co.*, 230 U. S. 247, 57 L. Ed. 1472.

Chesapeake & Ohio Ry. Co. v. *Westinghouse, Church, Kerr & Co.*, 270 U. S. 260, 70 L. Ed. 576.

Nekoosa-Edwards Paper Company v. *Railroad Commission*, 213 N. W. 633.

Interstate Commerce Commission v. *Stickney*, 215 U. S. 98, 54 L. Ed. 112.

Carriers generally recognize this obligation and hold themselves out to fulfill it.

The unqualified testimony of numerous witnesses, representing both carriers and shippers establishes that for more than forty years it has been the universal and unvaried custom and practice of the railroads of the United States, (including respondents in the cases) to include all so-called spotting or placement services in their established freight rates, where there are no conditions of interruption or interference.

As illustrative of such testimony, see the following:

C. E. Johnston, President, Kansas City Southern Railway Company. (R. 350-1)

W. N. Deramus, General Manager, Kansas City Southern Railway Company. (R. 307)

T. H. Meeks, Assistant General Manager, Texas & New Orleans Railroad. (R. 298)

J. S. Hershey, General Freight Agent, Gulf, Colorado & Santa Fe Railway. (Or. Tr. 5604-5)

W. E. Maxson, Assistant General Manager, Gulf, Colorado & Santa Fe Railway. (Or. Tr. 5604)

F. A. Key, Jr., Traffic Manager, Louisiana & Arkansas Railway Company. (Or. Tr. 5390)

J. L. Sheppard, General Freight Agent, Illinois Central Railroad. (Or. Tr. 3697; also R. 239)

There is no evidence in the record before the Com-

mission in these proceedings that such was not the uniform and unvaried custom; no witness testified to any restriction in such practice, of places where or circumstances under which the carriers have refused to place cars at any points *reasonably* accessible and convenient for loading or unloading, as desired by the shippers, which could be reached safely by their engines, where the consignor or consignee desired the carrier to place the cars.[4]

Such long standing custom and general usage have the effect of law in determining the duty and obligation assumed by the carriers with respect to the delivery service included within their carload freight rates.

Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 295 U. S. 193, 79 L. Ed. 1382.

Adams v. *Mills*, 286 U. S. 397, 76 L. Ed. 1184.

Charnock v. *Texas & Pacific Ry. Co.*, 194 U. S. 432.

The testimony before the Commission is definite and uncontroverted that as to *petroleum refineries* the carriers have followed the general custom of performing spotting services, as herein defined, under the compensation afforded by the regular freight rates, or have borne the costs thereof through the medium of allowances. This definitely appears as to no less than 32 petroleum refineries in various sections of the country covered by comprehensive testimony in this investigation including (in addition to the 7 refineries presently involved), the following:

---

[4] There are some industries at which the carriers have refused to make allowances, although standing ready to perform the conventional placement services.

Associated Oil Company	Avon, Calif.	Or. Tr. 11837
Midcontinent Petroleum Company	Tulsa, Okla.	Or. Tr. 6025
Phillips Petroleum Co.	Houston, Texas	Or. Tr. 5632
Pure Oil Company	Smith's Bluff, Texas	Or. Tr. 6095
Shell Oil Company	Martinez, Calif.	Or. Tr. 11852
	Watson, Calif.	Or. Tr. 11623
Shell Petroleum Company	Arkansas City, Kansas	Or. Tr. 6051
	Norco, La.	Or. Tr. 4967
	E. Chicago, Ind.	Or. Tr. 8384
	Roxana, Ill.	Or. Tr. 8378
	Houston, Texas	Or. Tr. 5632
Sinclair Refining Company	Coffeyville, Kansas	Or. Tr. 6060
	Houston, Texas	Or. Tr. 5452
	Wellesville, N. Y.	Or. Tr. 9624
Standard Oil Company of California	El Segundo, Calif.	Or. Tr. 11660
	Richmond, Calif.	Or. Tr. 11876
Standard Oil Co. (Indiana)	Whiting, Ind.	Or. Tr. 7328
	Wood River, Ill.	Or. Tr. 7389
Standard Oil Co. of N. J.	Bayonne, N. J.	Or. Tr. 10968
Standard Oil Company of New York	Tappan, New York	Or. Tr. 10965
Sun Oil Company	Toledo, Ohio	Or. Tr. 4395
	Marcus Hook, Pa.	Or. Tr. 11257
The Texas Company	West Tulsa, Okla.	Or. Tr. 6065
Union Oil Company	Oleum, Calif.	Or. Tr. 11824

Likewise, the testimony before the Commission is definite and uncontroverted that as to southern *sawmills*, the carriers have performed the services and applied their rates on *lumber* from the loading platforms at all mills situated within three miles of the railway main lines. There is comprehensive testimony to this effect respecting the following 38 sawmills:

H. Brown Lumber Co.	Lake Providence, La.	Or. Tr. 5278
E. L. Bruce Co.	Oak Grove, La.	Or. Tr. 5297
Caddo River Lumber Co.	Rosboro, Glenwood, Ark.	Or. Tr. 5030
Chicago Mill & Lumber Co.	4 Mills—Arkansas and Louisiana	Or. Tr. 5258
Davis Bros. Lumber Co.	Ansley, La.	Or. Tr. 5025
Delta Land & Timber Co.	Conroe, Texas.	Or. Tr. 5327
Fisher Lumber Co.	Wisner, Ferriday, La.	R. 176-7-9
Foster Lumber Co.	Fostoria, Texas	Or. Tr. 5336
French White Mfg. Co.	Arkansas City, Ark.	R. 178
Frost Johnson Lumber Co.	Bartholomew Spur, La.	R. 178
Frost Lumber Industries	Lorraine, La.-Tex.	Or. Tr. 5348
Gideon-Anderson Lbr. Co.	Gideon, Mo.	Or. Tr. 6169
Grant Timber & Mfg. Co.	Selma, La.	Or. Tr. 5083
Gulf States Creosoting Co.	Jackson, Miss.	Or. Tr. 5066
Hillyer-Deutsch Edwards	Oakdale and Mab, La.	Or. Tr. 5343
Hillyer-Edwards Fuller	Glenmora, La.	Or. Tr. 5021
Howe Lumber Co.	Hugo Spur, Ark.	Or. Tr. 5279
Industrial Lumber Co.	Oakdale, Elizabeth, La.	Or. Tr. 5127
Jasper County Lumber Co.	Jasper, Texas.	Or. Tr. 5544
J. M. Jones Lumber Co.	Ferriday, La.	Or. Tr. 4956
Kirby Lumber Co.	Call, Silsbee and Voth, Texas; Merryville, La.	Or. Tr. 5556
Mound City Lumber Co.	Hugo Spur, Ark.	Or. Tr. 5271
Ozan-Graysonia Lbr. Co.	Graysonia, Ark.	Or. Tr. 5279
Stimson Veneer Co.	Dumas, Ark.	Or. Tr. 5272
Temple Lumber Co.	Pineland, Texas	Or. Tr. 5602
Vail Donaldson Co.	Marmaduke, Ark.	Or. Tr. 6176
Willets Wood Products Co.	Willets, La.	Or. Tr. 4957
Wisconsin-Arkansas Lbr. Co.	Malvern, Ark.	Or. Tr. 5303

There is no petroleum refinery and no sawmill and no other industry particularly covered in this investigation[5] at which the record shows the carrier has refused to perform complete spotting services, under the regular freight rates, or has demanded additional charges over and above the freight rates, as the price for placing the cars at any points desired by the consignor (or consignee), reasonably accessible for loading or unloading on so-called private sidetracks, regardless of the size of the industry, or the complexity of the sidetracks with which it is served.

[5] The lists set forth are believed to be *complete lists* of all of the petroleum refineries and lumber manufacturing plants, or sawmills, concerning which there was particular substantial testimony before the Commission.

If a carrier desires to impose a separate charge for a terminal service, such as placement of cars, and not to include its compensation for such service in the established freight rate, it must plainly specify such charge in its published tariffs.

Section 6, par. (1) of Interstate Commerce Act.

Interstate Commerce Commission v. *Stickney*, 215 U. S. 98; 54 L. ed. 112.

Covington Stock-Yards Co. v. *Keith*, 139 U. S. 128; 35 L. ed. 73.

Interstate Commerce Commission v. *Chicago, Burlington & Quincy R. R. Co.*, 186 U. S. 320 at pp. 335, 337; 46 L. ed. 1182, at pp. 1190-1.

Associated Jobbers of Los Angeles v. *Atchison, Topeka & Santa Fe Ry. Co.*, 18 I. C. C. 310, at pp. 314-5.

There is no evidence in the record before the Commission of any general or specific provision in any tariff of any of the railroads respondents below, of a separate terminal charge for switching or spotting services at any sawmill or petroleum refinery. The absence of any such tariff charges further demonstrates that such placement services are within the obligation assumed by the carriers under the freight rates.

The published rates of the railroads for transportation of carload freight in general[6], and of petroleum products and lumber in particular, have been fixed in contemplation of the spotting service and include compensation therefor.

Among the cases wherein the Commission has prescribed the general basis of rates on petroleum in and from

[6] The only general or particular exception is the *Iron Ore Rate Cases*, 41 I. C. C. 181, wherein special reference was made to exemption of the terminal placement services from the established rate. See p. 219 of that decision. No similar expression or action is found in any other rate decision by the Commission.

southern and southwestern originating areas, when, as a matter of practice, the carriers were performing spotting services for all refineries or bearing the cost thereof, are:

General Petroleum Investigation, 171 I. C. C. 286.

Refined Petroleum Products in the Southwest, 171 I. C. C. 381.

Midcontinent Oil Rates, 1925, 139 I. C. C. 605.

Among the cases wherein the Commission has prescribed the general basis of rates on lumber, when, as a matter of practice, the carriers were performing spotting services for all sawmills or bearing the cost thereof, are:

Adams-Bank Lumber Co. v. *Aberdeen & Rockfish R. Co.,* 157 I. C. C. 280.

Lumber in the South, 196 I. C. C. 255.

West Coast Lumbermen's Asso. v. *RRs.,* and *Southern Pine Asso.* v. *RRs.,* 183 I. C. C. 191, 192 I. C. C. 343.

Southern Pine Asso. v. *A. & R. R. Co.,* 157 I. C. C. 171.

Norman Lbr. Co. v. *L. & N. R. R. Co.,* 29 I. C. C. 565.

Southeastern Lumber, 42 I. C. C. 548.

The rates on wallboard and paper products, as applicable from New Orleans and Bogalusa, have been fixed in various cases, comprehending the switching services from loading points at the plants of appellees.

Celotex Company v. *A., C. & Y. Ry. Co.,* 213 I. C. C. 637.

Celotex Company v. *A. C. L. R. R., et al.,* 159 I. C. C. 727, 179 I. C. C. 307.

Celotex Company v. *A. & W. Ry. Co., et al.,* 140 I. C. C. 274.

Celotex Company v. *A., C. & Y. Ry. Co.,* 136 I. C. C. 4.

Celotex Company v. *A., C. & Y. Ry. Co., et al.*, 132 I. C. C. 190.

Southern Class Rate Investigation, 100 I. C. C. 513, 109 I. C. C. 300.

III.

The carrier may lawfully employ a shipper to do the work of spotting, or any other transportation service, on the carrier's behalf, and may pay the shipper reasonable compensation therefor.

Sec. 15, par. (13) of Interstate Commerce Act.

Sec. 6, par. (1) of said Act.

The Tap Line Case, 23 I. C. C. 277, at p. 293.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42; 56 L. ed. 83.

Mitchell Coal & Coke Company v. *Pennsylvania R. R. Co.*, 230 U. S. 247; 57 L. ed. 1472.

Propriety of Operating Practices, 209 I. C. C. 11, 44.

The carriers have taken the position that they were free to employ, or to refuse to employ, an industry or shipper, as their agent, to perform spotting services on their behalf; and their right to so refuse (in the absence of unjust discrimination or undue preference), has been generally recognized by the courts and by the Commission.

Atchison, Topeka & Santa Fe Railway Co. v. *United States*, 232 U. S. 199, 58 L. ed. 568.

United Chemical & Organic Products Company v. *Director General*, 60 I. C. C. 523.

Whitaker Glessner Company v. *Baltimore & Ohio R. R. Co.*, 63 I. C. C. 47.

Sun Company v. *Director General*, 68 I. C. C. 11.

Although the record shows that the carriers not infrequently have refused, *in particular situations*, to employ

a certain industry and publish an allowance to such industry, under section 15 of the Act, for spotting services, the record shows no such instance where any of the railroads who are respondents in the particular orders now in question have refused, *in the alternative,* to perform the spotting service without any plus charge, where it was physically possible to do so.

In many cases, where the carriers have refused to publish an allowance to an industry for performing spotting services, they have subsequently done so, (or have performed the spotting service), under the terms of formal decisions of the Commission, requiring either payment or performance by the carrier.

For illustration, industries are referred to in the record as covered by the following decisions:

Standard Oil Company v. *Director General,* 59 I. C. C. 620; see Or. Tr. 7332.

Sun Co. v. *Director General,* 68 I. C. C. 11; see Or. Tr. 4395.

Florence Pipe Foundry & Machine Co. v. *Pennsylvania R. R. Co.,* 188 I. C. C. 215; see Or. Tr. 2066.

Riter-Conley Manufacturing Co. v. *Director General,* 58 I. C. C. 327; see Or. Tr. 9788.

United Chemical & Organic Products Company v. *Director General,* 60 I. C. C. 523; 73 I. C. C. 100; 112 I. C. C. 687; see Or. Tr. 7325.

The provision in paragraph (13) of section 15 of the Act for allowances by carriers to shippers for performing services or furnishing facilities was enacted on the recommendation of the Commission.

See *Annual Report of the Interstate Commerce Commission* for 1905 as quoted *infra* pp. 44, 45.

The Commission has repeatedly authorized and required establishment of section 15 allowances by carriers to shippers for spotting or placement services.

The Tap Line Case, 23 I. C. C. 277.

National Malleable Castings Company v. *P. & L. E. R. R. Co.,* 51 I. C. C. 537, and 24 previous cases cited therein.

United Chemical & Organic Products Company v. *Director General,* 60 I. C. C. 523; 73 I. C. C. 100.

Florence Pipe Foundry & Machine Co. v. *Pennsylvania R. R. Co.,* 188 I. C. C. 215.

The practice of paying allowances to sawmills on lumber traffic was initiated by the Commission itself.

The Tap Line Case, 23 I. C. C. 277, 293.

C. E. Perkins, Vice President, Missouri Pacific Railroad. (Or. Tr. 6326)

F. A. Key, Jr., Traffic Manager, Louisiana & Arkansas Railway. (Or. Tr. 4953; R. 180)

J. S. Hershey, General Freight Agent, Santa Fe Lines (Or. Tr. 5569)

J. A. Lynch, General Freight Agent, Texas & Pacific Railway. (Or. Tr. 5979-81)

So far from being wasteful or extravagant, the practice of employing shippers or industries to perform spotting services and the making of reasonable allowances therefor, is an economy to the carriers and makes for efficiency in railroad operations.

The uncontroverted testimony of numerous railroad operating witnesses shows that it is generally an economy to the carriers to make such allowances.

The uncontroverted evidence is that the carriers have set up a procedure, (as outlined by the Commission itself), under which a cost-finding joint committee de-

termines what it would cost the carrier to perform the service of spotting which falls within the rate, and the allowance granted is always less than such cost.

C. E. Perkins, Vice President, Missouri Pacific. (Or. Tr. 6331-2.)

E. B. Boyd, Chairman of the Western Trunk Line Committee of Western Carriers. (Or. Tr. 8581.)

D. T. Lawrence, Chairman of the Trunk Line Association of Eastern Lines. (Or. Tr. 11413.)

Such procedure for granting allowances and determining the amounts thereof[7] is in part described in Exhibit No. 106, (Vol. No. 1 of exhibits, pages 297-309), and Exhibit No. 264 (Vol. No. 2 of exhibits, pages 251, *et seq.*) and Exhibit No. C-65, volume No. 4 of Exhibits, pages 429, *et seq.*

There is no testimony by any witness that any allowance paid by the carriers to any industry here before the Court exceeds what would be the cost to the carrier of performing the service covered by its acknowledged duty under the established rates.

The specific affirmative testimony as to the industries now before this Court in the present cases is, that the allowance granted to each is less than it would cost the carriers to perform the service which it is their acknowledged duty to render.

---

[7] The cost studies therein provided for and the examination by the operating departments in these cases, according to the testimony, contemplated allowances less than the cost to the carrier of performing the conventional placement services. For example, the formula adopted by the eastern carriers for determining allowances provides:

"6. The allowance to a plant for switching service performed for carrier lines shall be the same amount for each connecting railroad and shall not exceed the reasonable cost to the industry for performing the service, and in no case more than it would cost the railroad to perform the same service with its own power, at its convenience and when it can be performed without interference or interruption." Ex. C-65, Vol. No. 4 of Exhibits, page 429.

As to *Standard Oil Company of Louisiana,* Baton Rouge refinery:

R. W. J. Flynn. (R. 215)
W. B. Higgins, Illinois Central R. R. (R. 236-8)
C. D. Lunday, Louisiana & Arkansas R. R. (R. 232)

As to *Pan American Petroleum Corporation,*[8] Destrehan refinery:

J. E. Monroe. (R. 244)
W. B. Higgins, Illinois Central R. R. (R. 238)

As to *Gulf Refining Company,* Port Arthur refinery:

C. L. Franklin. (R. 259)
J. C. Beck. (R. 262)
T. H. Meeks, Texas & New Orleans R. R. (R. 266)

As to *Humble Oil & Refining Company,* Baytown refinery:

J. R. Davis. (R. 328)
L. A. David, N. O. T. & N. R. R. (R. 329)

As to *Magnolia Petroleum Company* plant at Chaison, Texas:

W. M. Maddox. (R. 290)
T. H. Meeks, Texas & New Orleans R. R. (R. 297)

As to *The Texas Company,* Houston and Port Arthur plants:

Charles Ervin and J. M. Fleming. (R. 303, 318)
W. B. Drake, Port Terminal R. R. (R. 308)
T. H. Meeks, Texas & N. O. (R. 304)

As to *The Celotex Company* plant at Marrero, Louisiana:

W. T. Bowker. (R. 188)
J. A. Lynch, Texas & Pacific Ry. (R. 204)
E. S. Pennypacker, T. & P.-M. P. Terminal Ry. (R. 205)

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[8] Referred to in the record and in the Commission's report and order by the name of the predecessor company, Mexican Petroleum Corporation of Louisiana, Incorporated.

As to *Great Southern Lumber Company*, Bogalusa sawmills:

J. P. Cassidy. (R. 208)
G. P. Brock, G. M. & N. R. R. (R. 211)

IV.

The Commission exceeded its authority, for cease and desist orders require jurisdictional findings, lacking in the present cases.

Before the Commission may enter a cease and desist order, it must find as a condition precedent to the exercise of its powers that the assailed rate or practice was unreasonable, unduly preferential, unjustly discriminatory or otherwise unlawful.

Section 15, par. (1) of Interstate Commerce Act.

Interstate Commerce Commission v. *Louisville & Nashville Railroad Co.*, 227 U. S. 88, 92; 57 L. ed. 431.

Southern Pacific Company v. *Interstate Commerce Commission*, 219 U. S. 433; 55 L. ed. 283.

Interstate Commerce Commission v. *Stickney*, 215 U. S. 98, 105; 54 L. ed. 112.

Interstate Commerce Commission v. *Northern Pacific Railway Company*, 216 U. S. 538, 544; 54 L. ed. 608.

United States v. *Baltimore & Ohio Railroad Co.*, 293 U. S. 454; 79 L. ed. 587.

The Commission's jurisdictional findings of fact, to be effective in supporting its order, must be clear and specific.

United States v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company*, 294 U. S. 499; 79 L. ed. 1023.

Atchison, Topeka & Santa Fe Ry. Co. v. *United States*, 295 U. S. 193; 79 L. ed. 1382.

Florida v. *United States,* 282 U. S. 194; 75 L. ed. 291.

Southern Pacific Company v. *Interstate Commerce Commission,* 219 U. S. 433, 55 L. ed. 283.

Beaumont, Sour Lake & Western Ry. Co. v. *United States,* 282 U. S. 74, 75 L. ed. 221.

The Commission did not make the requisite specific findings in the present cases. It did not find that any of the allowances condemned in its cease and desist orders were unreasonable; or that there was *undue* preference in favor of the appellees as receivers of such allowances and *undue* prejudice against other shippers, under circumstances creating a violation of Section 3.

See findings of the Commission in reports involved in the several cases below, as follows:

In No. 331, see 209 I. C. C. 68 at p. 72, (R. 110).
In No. 314, see 209 I. C. C. 394 at p. 396, (R. 54).
In No. 315, see 209 I. C. C. 764 at p. 766, (R. 72).
In No. 317, see 209 I. C. C. 793 at p. 796, (R. 92).
In No. 690, see 209 I. C. C. 727 at p. 729, (R. 546).
In No. 691, see 209 I. C. C. 93 at p. 98, (R. 579).
In No. 692, see 209 I. C. C. 767 at p. 769, (R. 607).
In No. 693, see 209 I. C. C. 756 at p. 760, (R. 644).
In No. 718, see 213 I. C. C. 583 at p. 589, (R. 671).

Not all discriminations or preferences are unlawful, but only such as create undue or unreasonable preference and undue prejudice.

Section 3, paragraph (1) of Interstate Commerce Act.

Interstate Commerce Commission v. *Baltimore & Ohio R. R. Co.,* 145 U. S. 263, 36 L. ed. 699.

Texas & Pacific Railway Company v. *Interstate Commerce Commission,* 162 U. S. 197, 40 L. ed. 940.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42; 56 L. ed. 83.

Penn Refining Company v. *W. N. Y. & P. R. Co.*, 208 U. S. 208, 52 L. ed. 456.

United States v. *Illinois Central Railroad Company*, 263 U. S. 515, 521; 68 L. ed. 417, 424.

A practice of a carrier may not be condemned because of the fact that it is advantageous and beneficial to the shipper as well as to the carrier. Mutuality of advantages is recognized by the courts as desirable.

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42, 47; 56 L. ed. 83.

United States v. *Interstate Commerce Commission*, 277 Fed. 538, 542.

An allowance to a shipper, when provided in a published tariff of the carrier, cannot be considered as a rebate in violation of section 6 of the Act.

Sec. 15, par. (13) of Interstate Commerce Act.

Sec. 6 of said Act.

F. H. Peavey & Co. v. *Union Pac. Ry. Co.*, 176 Fed. 409, (Circuit Court, Missouri, Judges Sanborn, Hook and Adams).

American Sugar Refining Co. v. *Delaware, L. & W. R. Co.*, 207 Fed. 733, (Circuit Court of Appeals, Third Circuit, 1913).

Interstate Commerce Commission v. *Diffenbaugh*, 222 U. S. 42, 56 L. ed. 83.

United States v. *Baltimore & O. R. Co.*, 231 U. S. 274, 58 L. ed. 218.

The published tariffs of the railroads are controlling in the matter of rates applied and charges exacted on shipments.

Poor Grain Co. v. *C., B. & Q. Ry. Co., et al.*, 12 I. C. C. 418.

Davis v. *Portland Seed Co.*, 264 U. S. 403; 68 L. ed. 762.

Beaumont, Sour Lake & Western Ry. Co. v. *Magnolia Provision Co.*, 26 Fed. (2d) 72.

V.

There is no substantial evidence of record before the Commission to support the conclusions and so-called findings of fact in the particular supplemental reports now sought to be enjoined.

The principles laid down in the original report are not conceded to be correct or to be supported by substantial evidence; but if they be assumed to be well founded, those principles do not apply to the particular industries here before the court.

There is no evidence that the so-called interchange tracks at any of the several plants of appellees are reasonable points for the delivery or receipt of carload freight; and there is no evidence that it is physically possible to load freight into cars or unload freight from cars while standing on such interchange tracks.

There is no evidence whatever that interference or interruption has been, or would be, encountered at any of these industries if the railroad performed the spotting service, giving to the words interruption and interference their reasonable and ordinary common-sense meaning.

There is no evidence that the service performed for any of these industries or the allowance paid to any of these industries is in any way preferential to either of them, or *unduly preferential*, or that any other shipper or receiver of freight is thereby subjected to *undue prejudice*.

There is no evidence that any of these industries is receiving any payments from the carriers not in strict

accordance with the terms of the tariffs of rates and charges published and on file with the Commission, in compliance with section 6 of the Interstate Commerce Act.

The affirmative evidence of record as to each of these industries is uncontroverted and contrary to each of the Commission's findings hereinabove referred to.

SUMMARY OF ARGUMENT.

In reviewing orders of the Interstate Commerce Commission having to do with the rates and practices of the railroads, it is not the function of the courts to substitute their independent judgment for the judgment and discretion of the Commission. The court below did not do so in its opinion and decrées setting aside the Commission orders here under review. Undoubtedly, the Commission has authority, after proper investigation and upon proper substantial evidence, to order carriers to cease and desist from any rate or transportation practices found to be unlawful. Such power unquestionably extends to the correction of any unlawful practice in respect of allowances under paragraph (13) of Section 15 of the Act. On the other hand, the statute does not empower the Commission to enter a cease and desist order against a practice which is not in violation of express provisions of the Act and not shown to be so by substantial evidence upon full hearing under a proper investigation.

The present cases arise under a general investigation in which the Commission entered a broad main report (209 I. C. C. 11) wherein it discussed at length the nationwide practice of the railroads whereby shipments are taken from or delivered to points of loading and unloading on sidetracks of private industries and the many

cases in which the carriers make allowances to shippers out of the established line-haul rates for such services when performed by the shipper for the railroad's account. In general, the Commission found that spotting services are included within the freight rates, unless in the performance of such placement services interruptions or interferences are encountered, because of some action or disability of the industrial plant, in which event "the carrier's duty with respect to the delivery or receipt of cars does not extend beyond the point of interruption or interference"; it declared any allowance covering the performance of a service beyond such point of interruption or interference would be unlawful.

The Commission thereupon proceeded to issue supplemental cease and desist orders, with the professed purpose of eliminating abuses. While orders directed against the allowances at the plants of appellees *purport* to carry out an intention to correct abuses or improper transportation practice at these plants, actually they were entered without any regard to the evidence or lack of evidence of such suspected abuses, as though the Commission were bent on destroying the allowance practice, as such. The action taken in the individual cases affecting appellees is strangely inconsistent with the Commission's main report, which expressly recognized the lawfulness of allowances when made for a service performed by the shipper, which the carrier otherwise would have been obligated to perform with its own facilities; and in effect the Commission's action is contrary to the express provisions of paragraph (13) of Section 15 of the Act.

In exercising its powers by the entry of a cease and desist order, it is well settled and the plain requirement of the statute is that the Commission (a) shall find a violation of the Act, and (b) that such finding be not arbitrary but based on substantial evidence.

The statutory court reviewed fully the entire record made before the Commission in these proceedings and in essence concluded and found: *first,* that the Commission's findings were fatally defective; *second,* that there was no evidence of any fact which would have the legal effect of restricting the obligation of the railroads to perform the services for which the allowances were paid to the several appellees; *third,* that the allowances in question were lawfully made; and *fourth,* that under the evidence in these cases, the Commission was without power to prohibit the allowances. These conclusions of the Court were correct and the decrees should be affirmed.

Appellees contend that the services covered by the allowances to the several appellees are services of transportation, within the carriers' assumed obligation under the established freight rates.

These industries are principally producers of petroleum products and lumber and related articles. As to *lumber,* the Commission itself initiated the practice of the railroads in making allowances to sawmills in southern pine territory; and this was in conformity with the decision in the *Tap Line Cases,* 234 U. S. 1. The established freight rates on lumber were expressly designed to apply from loading platforms at all sawmills situated within three miles of the rails of trunk line carriers. As to *petroleum,* the rates were prescribed to apply from the loading tracks at southern refineries; and the railroads, by universal rule in the Consolidated Classification, have, in substance, restricted the carload rates on the principal petroleum products, (excepting asphalt) when moving in tank cars, so that they will apply only to and from tracks equipped with piping facilities.

Having the duty to perform the services in question, under the established rates, the carriers may lawfully

employ the appellees to perform the services for them and pay allowances therefor out of the freight rates, by virtue of the express provision of paragraph (13) of Section 15 of the Act, which was enacted upon the recommendation of the Commission to the Congress. While the Commission has undoubted power to determine whether such allowances are reasonable or unjustly preferential, upon proper evidence, it has not the power to prohibit such allowances entirely, unless otherwise violative of law; for to do so would be to assume the power to repeal what Congress had enacted.

To support a cease and desist order, quasi jurisdictional findings are essential; and these are entirely lacking in the present cases. The terms of the Transportation Act, heavily relied upon by appellants, gave the Commission no new power to act by way of entry of cease and desist orders without supporting findings of violations of the Interstate Commerce Act, based upon substantial evidence.

There is no evidence in the proceedings before the Commission of any violation of law, with respect to the allowances paid appellees, to sustain or support the Commission's cease and desist orders.

The Commission orders here under consideration are nothing less than attempts at administrative repeal of paragraph (13) of Section 15 and therefore void. That legislation was enacted in 1906, upon the recommendation of the Commission; and Congress, not the Commission or the Courts, has power to repeal or amend such legislation.

The present cases may be readily distinguished from the circumstances in the cases involved in *United States* v. *American Sheet & Tin Plate Company,* 301 U. S. 402, and the order of affirmance therein should not be determinative of the present cases, for nothing therein decided tends to establish error in the decisions of the statutory court in the present cases.

ARGUMENT.

The court below was not asked to review any matter of judgment or discretion of the Commission; and the opinion of that court, together with its findings of fact and conclusions of law, clearly indicate that the orders of the Commission were set aside on proper grounds having to do with the lack of any authority on the Commission to forbid a rate and transportation practice which had not been found to be in violation of the law upon substantial evidence establishing such violation.

The orders of the Commission now before this Court for review are only a few of more than fifty orders issued by the Commission in the investigation entered into on its own motion known as *Ex Parte No. 104, Part II.* This Court has sustained a number of those orders by its decision in *United States* v. *American Sheet & Tin Plate Company,* 301 U. S. 402, and in the later orders *per curiam* in *Goodman Lumber Company* v. *United States* and *A. O. Smith Corporation* v. *United States,* 301 U. S. 669. In confirming the orders of the Commission in those cases, this Court said in its opinion:

> "the Commission properly held that each case must be decided on the circumstances disclosed."

Prior to that decision, the statutory court had decided the present cases; its decision and decrees, as we expect to show, were and are correct upon the circumstances of these cases as disclosed by the record before the Commission and therefore before the Court; and the decrees are in no respect out of harmony with the law as declared by this Court in the *American Sheet & Tin Plate Co. case.*

Appellees had complained to the three-judge court below and petitioned for injunctive relief representing in substance that the Commission had committed gross error in these cases, both because of the absence of any findings of violation of the Act, and because there was no substantial evidence upon which such findings could be predicated. The orders which the Commission permitted to be entered in its name and with its approval, were, so far from being supported by findings based on all of the circumstances disclosed, issued on the basis of findings only of vague economic improprieties not definitely identifiable with any prohibition in the Act. Moreover, the conclusions expressed by the Commission were not only unsupported by evidence but actually flout or ignore the facts shown of record. Examining the record, it will be noted that the *questions* addressed to witnesses by Commission counsel, were replete with suggestions of poor business judgment on the part of the carriers and economic abuses; but the testimony of the witnesses, and the exhibits, afford no substantial evidence in any of these cases of any violation of the various prohibitions of the Interstate Commerce Act.

I.

The decrees of the court below are correct and should be affirmed.

We agree with appellants, in the statement in their brief, p. 6, that the ultimate question for this Court is whether the lower court erred in holding that the Commission's orders were invalid.

The statutory three-judge court entered findings of fact (R. 171, 559) and conclusions of law (R. 175, 559), which are in harmony with the petitions and prayers for relief in all of these cases, and are supported by the record,

comprising the full transcript and exhibits made at the Commission hearings. Thereupon, the court entered decrees setting aside and enjoining the enforcement of the Commission's several orders. These decrees are well supported and sound and should be affirmed. The general conclusions of the court below, as stated in its opinion entered February 24, 1937, 18 F. Supp. 624, at 628 (R. 160) are in substance as follows:

First, that the work of transporting, switching and spotting cars for which the plaintiffs were paid allowances, are services of transportation within the assumed obligation of the carriers under the established freight rates;

Second, that having the duty to perform the service in question, the carriers properly and lawfully contracted with the respective appellees to perform the same for them and properly and lawfully made allowances therefor out of the freight rates, under their tariffs;

Third, that while the Commission undoubtedly had power to determine whether such allowances are reasonable or unreasonable in amount and whether they do or do not result in unlawful preference, yet on the record made it had no power wholly to prohibit such allowances; and

Fourth, that to support a cease and desist order, certain jurisdictional findings of fact are requisite; and that in these cases, no such sufficient findings appear either in the orders themselves or in the reports which are made a part thereof.

The court further suggested that there was no evidence disclosed of record before the Commission of any violation of law to support the Commission's orders; and it made definite finding to this effect. (R. 175, Finding 11) We can discover in the brief for appellants no specific

citations of evidence or findings which demonstrate that the court below erred in any of these conclusions. Indeed, the position of counsel for the United States and for the Commission appears to be that there is almost a conclusive presumption that such orders of the Commission are correct and supported by the record; and their argument implies that the findings and decrees of a statutory three-judge court should be treated as of little significance and even less importance. To this we do not agree.

The foregoing main points of the lower court's determination will be discussed below.

II.

The services of switching and spotting cars covered by the allowances here in question are services of transportation, included under established freight rates.

It must be conceded that there are or may be industrial plants[9] to which a railroad may have granted an allowance for a pseudo terminal service performed under circumstances beyond any obligation properly assumed by the carrier under the established freight rates. On the other hand, it has never been contended that the services of switching and spotting cars on tracks serving industries is never a part of the interstate transportation service comprehended within the freight rates, for which the carrier may properly make an allowance under paragraph (13) of Section 15 to the shipper for doing such work on the carrier's behalf. As this Court has said, "each case must be decided on the circumstances dis-

[9] Such as plants equipped with networks of interlocking standard and narrow gauge tracks, similar to that described in the *General Electric Company cases*, 14 I. C. C. 237, 219 N. Y. 227.

closed." The important fact in these cases is that the Commission's declaration that the carrier's obligation ends at the interchange tracks is inconsistent with its own test for measuring that obligation and is contrary to the Commission's prior reports and the universally accepted concept of the obligation.

The orders in question, therefore, are not based on a decision of these cases upon the circumstances disclosed but rather have the effect of restating the legal obligation to fit the Commission's purpose to destroy allowances.

THE ASSAILED ORDERS ARE IN CONFLICT WITH THE COMMISSION'S ORIGINAL REPORT.

We are willing to accept, for purposes of determining these cases, the definitions and limitations stated by the Commission itself in its broad main report in these Ex Parte 104, Part II, cases, 209 I. C. C. 11, at page 44 and in the first two headnotes as an accurate statement of the law. But on the basis of that decision, plainly and sensibly construed and applied, at not one of the plants of appellees now before this Court can it be said that the work done under the allowances was not a part of the transportation obligation of the carriers, commonly and uniformly accepted by them, or that there is any evidence to such effect.

The Commission there states:

> "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference *by the desires of an industry or the disabilities of its plant, such as* the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, as set forth more specifically in rules 8, 9 and 10 of the appendix, the service be-

yond the point of interruption or interference is in excess of that performed in simple switching or team-track delivery. Payment for, or assumption by the carrier of, the cost of service performed beyond such points of interruption or interference is found to be unlawful in violation of section 6 of the act." (*Our italics.*)

The clear implication of this conclusion is that where there are no interruptions or interferences with the continuous work of switching, the service of placing cars at loading or unloading points is within the recognized obligation of the carriers. There is no evidence whatsoever in any of the present cases that the allowances were paid for services beyond points of interruption or interference or under circumstances that imply possible interruptions or interferences.[10] To the contrary, there is clear affirmative testimony of railroad witnesses in these cases that would foreclose any such implication definitely establishing that the allowances cover services only of placing cars at points to which they are and may be taken without encountering obstructions, or interferences, or interruptions. Inasmuch as the Commission's main report recognizes the inclusion of uninterrupted placement work within the services covered by the freight rates, it follows that the orders here in question are in conflict with that finding.

It is to be emphasized that the plants now under discussion are primarily petroleum refineries, sawmills and allied businesses, with respect to which the record is very clear, that it is the uniform custom of the carriers to include in their freight rates, on lumber and petroleum products, the service of placing cars on so-called private sidetracks, at points reasonably convenient and accessible for loading and unloading. Such *placement* is a service

[10] The evidence as to the conditions at the plants of appellees is analyzed in Part 2 hereof and discloses no evidence of interferences.

of transportation comprehended in the established freight rates as a matter of law, under the statutes and reported cases.[11]

There is also an abundance of testimony, of affirmative and unqualified nature, by numerous witnesses representing both carriers and shippers which establishes that for more than forty years it has been the universal and unvaried custom and practice of the railroads who were respondents below, and of other railroads of the United States, to include the conventional spotting or placement services in their established freight rates. As illustrative of such testimony, we have witnesses for the railroads serving the plants of appellees in the record before the Commission, referred to under *Points and Authorities*, p. 9, *supra*.

As to the particular cases now under consideration, the record before the Commission is unqualified and without contradiction that the invariable custom of the carriers is to perform themselves, or bear the cost of performing, the services of placing cars in petroleum refineries at the points where the oil is loaded or unloaded; and the same thing is true as to lumber moving from sawmills.

THE INVARIABLE CUSTOM OF CARRIERS TO PERFORM SPOTTING SERVICES AT REFINERIES.

Six of the underlying cases now before the Court involve allowances to *petroleum refineries* made in conformity with par. (13) of section 15 of the Act, but which the Commission condemns as unlawful.

The uniform practice and custom of the particular carriers who were respondents below and of all carriers throughout the United States has been to perform com-

[11] For authorities, see page 8, *supra*.

plete placement services at oil refineries as a part of the transportation for which they are compensated by their established freight rates. This is fully established by the evidence; and we respectfully submit that there is not a scintilla of testimony to the contrary, or to indicate any exceptions or limitations as to such practice.

Counsel for appellants made no effort, in the court below, to offer any references to the record in rebuttal of this assertion, which they have at no time specifically contradicted. Their brief in this Court contains no reference to any refineries where the spotting services have not in fact been performed by the carriers or at their expense as a part of their assumed obligation. The absence of such showing is signficant when it is remembered that the Commission concluded that each appellee, through the medium of the allowances, was receiving a service *not accorded to shippers generally.*

It is to be noted that their obligation as regards spotting at the plants of the appellees is expressly admitted by the several railroads serving these plants in the answers which they filed as co-defendants in the court below. These defendants have not joined in the appeals, and severances were taken. (R. 517) Substantially all of the railroad companies named as respondents in the Commission orders have answered in the courts that their established freight rates contemplate the receipt and delivery of the freight at the loading and unloading points in the particular plants of these appellees and admit that their obligation under the freight rates covers the services for which the allowances are paid. The testimony supports these statements, without qualification.

Sometimes the service of placing the cars in refineries at points convenient for loading and unloading is done

by the carriers with their own engines and power; and sometimes they employ the shippers to perform such placement services, making an allowance therefor. There are two or three isolated instances disclosed by the record where the refinery, for its own reasons and convenience, has preferred to place the cars at points of unloading and loading rather than to have the carrier enter into all parts of the plant inclosure; but we find no instance recorded where the carrier has refused to do the work of placement where it was physically possible for it to do so.

The record before the Commission will be found to contain *comprehensive* testimony regarding twenty-four other petroleum refineries,[12] which are situated at various points in the states of California, Illinois, Indiana, Kansas, Louisiana, New Jersey, New York, Pennsylvania and Texas. There is also definite testimony, not so comprehensive, as to the practice of the carriers at a considerable number of other petroleum refineries situated in the various oil refining districts of the country. As to not one of these refineries is there any testimony that the carriers have sought to impose a separate and additional charge for placing cars for loading or unloading at any points accessible to their locomotives or that they have refused to perform such service. All of the testimony is to the contrary.

First, at the larger number of refineries, the work of placing cars has been done by the carriers with their own engines and crews, as a matter of course under their admitted obligation and no charge for spotting has been made or demanded.

Second, there are certain refineries where the carriers formerly paid allowances under Section 15, but subse-

[12] These refineries are listed on page 11, *supra*, with appropriate references to the record before the Commission.

quent to the inception of this investigation, the allowances were relinquished by the oil companies and the carriers have undertaken to and now perform all spotting services, without any charge aside from the established freight rates. At other refineries, the carriers have paid and are continuing to pay allowances for spotting services thereby including the same in the full transportation service for which they are compensated at the established freight rates.

Third, at a few refineries, none of which are very definitely identified in the record, the spotting services have been performed by the refinery, *at times;* but as to these there is no evidence that the carriers have refused to perform the service, upon demand of the refinery.

Other testimony as to particular refineries confirms the foregoing statements. We offer these illustrations:

(a) Witness O. L. Young, Superintendent of St. Louis-San Francisco Railway, testified to his familiarity with operations at other refining points in Oklahoma, at Enid, Okmulgee, Bristow, Sapulpa and Tidal. He further testified that the character of service was practically the same at each of these refineries as that rendered for the Midcontinent Petroleum Company at Tulsa, Okla., which he had previously testified received spotting services by the railroad without charge. (Or. Tr. 6036)

(b) Witness J. E. Monroe of the Pan American Petroleum Corporation testified that at all of the various refineries and bulk oil terminals of his companies, cars were placed by the carriers at their own expense, including their plants at Baltimore, Savannah, Jacksonville, Tampa and Memphis. (R. 246, 8)

(c) Witness H. G. McNamara, of Standard Oil Company of New Jersey testified that at refineries through-

out the New York-New Jersey area, the carriers always placed the cars at the points desired by the petroleum companies for loading and unloading throughout the refineries, and without any plus charges over and above the regular freight rates. He named the Tidewater Oil Company and Gulf Refining Company at Bayonne, The Texas Company, Shell Company, Vacuum Oil Company, Barber Asphalt Company and others, as well as the refineries of the Standard Oil Company of New Jersey at Bayway and Bayonne, New Jersey. (Or. Tr. 10978)

(d) Witness Porter L. Howard of the Sun Oil Company of Marcus Hook, Pennsylvania, gave similar testimony, not only as to the placement services by carriers at his own refinery, but also as to the Sun Oil Company, Pure Oil Company, Sinclair and Texas Oil Companies, and the Atlantic Refining Company, all in the general region of Philadelphia. (Or. Tr. 11262) This testimony was confirmed by Mr. A. T. Owen, Superintendent of Transportation of the Reading Company. (Or. Tr. 10532 and 11261)

(e) Witness Fred S. Hollands of the Standard Oil Company (Indiana), testified to the regular practice of the carriers to perform all desired placement services at the refineries of Empire, Sinclair and Shell Refining Company in the Chicago district and The Texas Company at Lockport, Illinois (Or. Tr. 7341) as well as at the refineries of his own company at Wood River, Illinois, Sugar Creek, Missouri, and Casper, Wyoming. (Or. Tr. 7342)

THE CARRIERS' UNIFORM CUSTOM OF PERFORMING SPOTTING SERVICES AT SAWMILLS AND MANUFACTURING PLANTS.

Two of these cases now before the Court involve allowances paid in connection with placement services performed for the carriers at sawmill and paper manufacturing plants at Bogalusa, Louisiana, and at a manufacturing plant producing wallboard and kindred articles competitive with lumber, in the New Orleans district, at Marrero, Louisiana.

The uniform practice and custom of all carriers throughout the United States, including the respondent carriers, has been to perform the complete service of placing cars at points convenient for loading and unloading at sawmills, paper mills and similar manufacturing establishments, as a part of the transportation for which they are compensated by their established freight rates. There is an abundance of evidence to this effect in the record before the Commission; and there is no testimony whatever to the contrary. Counsel for appellants in their brief cite no testimony and referred to none in the court below to the contrary.

The record is particularly illuminating with respect to the practices of the carriers in this behalf *at sawmills.* The Commission by its orders herein puts itself in the position of finding unlawful a practice which it specifically approved and initiated in its previous decisions in *The Tap Line Case,* 23 I. C. C. 277, 293, and its previous consideration of the situations at individual sawmills.

The record shows that at many sawmills in the southern pine territory the railroads place the cars with their own power and crews at the loading platforms, while in numerous other cases, the lumber companies are employed

to do so and are paid allowances under par. (13) of Section 15 of the Act.[13]

The sawmill at Bogalusa, Louisiana, and the nearby paper mill and other industries at that point are large modern establishments and naturally they have track facilities which unquestionably were designed to accommodate the very large volume of their inbound and outbound traffic by railroad. These facts are clear from the testimony. (R. 206 *et seq.*)

In this investigation, the Commission inquired *in detail* into the facts at some twenty sawmills where the carriers are paying allowances to the lumber companies for the work of placing cars at points convenient for loading and unloading. As to almost all of these sawmills, it was testified that the facts had been submitted to the Commission for its approval, before the allowances were made. This is specifically true also of the plant of petitioner The Celotex Company at Marrero, Louisiana, where the facts were laid before the Commission in a joint letter of carriers and the industry before the allowance was put into effect. (R. 481-3, 490-2)

The significance of this fact is that it illustrates the recognition of the duty and obligation of the carriers to include within the measure of their freight rates the service of placing the cars within the plants at points reasonably convenient for loading and unloading; and at the same time it indicates the error of the Commission's holding that as the result of the allowance payment: "the industry enjoys a preferential service not accorded to shippers generally."

The record is replete with testimony that the practice of paying such allowances was initiated by the Commission itself.[14]

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[13] See pages 12 and 17, *supra*.

[14] See page 17, *supra*.

THE ESTABLISHED FREIGHT RATES INCLUDE SPOTTING SERVICE.

The freight rates on petroleum and its products for the most part have been fixed by the Interstate Commerce Commission in general proceedings decided in recent years. Prominent among these cases are:

General Petroleum Investigation, 171 I. C. C. 286.

Refined Petroleum Products in the Southwest, 171 I. C. C. 381.

Midcontinent Oil Rates, 1925, 139 I. C. C. 605.

When the foregoing cases were heard and decided, the carriers were either performing or bearing the cost of the placement services at all of the refineries on in and outbound traffic. The rates were established therein to cover the complete transportation service from place of loading at origin to place of unloading at destination. There can be no question, therefore, that the established rates cover the spotting services and that no additional or separate charge was contemplated therefor.

The freight rates on lumber to a considerable extent have been fixed by the Commission, many of them on the blanket plan, so that the same rate applies from all mills within a large origin area. (Or. Tr. 5289; see 33 I. C. C. 33; 183 I. C. C. 191 at pages 210, 213)

These lumber rates have been established or reviewed by the Commission in many cases and when established and reviewed, the service of placing the cars at points convenient for loading and unloading in sawmills was being performed by the carriers, or at their expense by virtue of allowances.

Adams-Bank Lumber Co. v. *Aberdeen & Rockfish R. Co.,* 157 I. C. C. 280.

Lumber in the South, 196 I. C. C. 255.

West Coast Lumbermen's Asso. v. *RRs.*, and *Southern Pine Asso.*, v. *RRs.*, 183 I. C. C. 191, 192 I. C. C. 343.

Southern Pine Asso. v. *A. & R. R. Co.*, 157 I. C. C. 171.

Norman Lbr. Co. v. *L. & N. R. R. Co.*, 29 I. C. C. 565.

Southeastern Lumber, 42 I. C. C. 548.

See also the quotation from the *Tap Line Case* set forth at p. 47, *infra*.

It can hardly be said that the carrier is not compensated for the spotting service and that therefore it is not obligated to perform that service in view of the fact that the rates were prescribed in full realization of the service which was being performed under those rates.

III.

Having the duty to perform the switching and spotting services, the carriers lawfully employed appellees and made allowances therefor.

The text of the several supplemental reports and especially the language embodied in the concluding paragraphs of each of them makes it plain that what the Commission was doing and intending to do was to *abolish* these allowances, on the ground that they were unlawful under paragraph (7) of Section 6 of the Act. The correctness of this action was strongly urged by counsel for the United States and for the Commission in the court below; but the court correctly held that under paragraph (13) of Section 15 of the Act, the carriers lawfully employed appellees and made allowances therefor under their tariffs, since the services performed by these appellees were services of transportation.

This Court in *United States* v. *American Sheet & Tin Plate Company, supra,* definitely upholds our position in this matter saying, in comment on like contention made therein by the appellee industries:

> "Respecting Section 6 (7) they say that as, by that section and Section 15 (13), allowances to shippers who perform a part of the service of transportation are permissible if tariffs setting forth the nature and amount of the allowance are duly filed, as they were in the present instance, it cannot be an unlawful refund or rebate for the carriers to make the allowances which the tariffs specify. If the findings were limited to the practices specified in the sections mentioned the position of the appellees would no doubt be sound."

The Commission's apparent misconception of the application of paragraph (7) of Section 6, as adopted in its reports and orders here assailed, is the more strange when we consider three facts: (a) That the provisions of paragraph (13) of Section 15 were enacted by the Congress upon the particular recommendation of the Commission itself; (b) that the practice of paying allowances to sawmills on lumber traffic in southern territory was initiated by the Commission itself and repeatedly and consistently approved by it; and (c) that the allowances to other appellees herein were in most of the cases approved by the Commission before their establishment, subject to the requirement of publication in tariffs filed with the Commission.

THE COMMISSION SECURED THE ENACTMENT OF SEC. 15 (13).

Paragraph (13) was inserted in Section 15 of the Act by the amendment approved June 29, 1906, and as the result of the recommendation of the Commission in its Annual Report to the Congress for the Year 1905, from which we quote the following, *emphasis supplied:*

"TERMINAL ROADS, ELEVATOR CHARGES, AND PRIVATE CARS.

"There is an important class of cases, in which the owner of the property performs a part of the transportation service, where the carrier, by paying such owner an extravagant sum for the service rendered, thereby prefers him to other shippers of like property. This may happen in any case where the shipper is the owner of any of the facilities of transportation or performs any part of the transfer service. Such preference may take the form of an excessive division to a terminal road owned by the shipper; the payment of an excessive elevator charge to the owner of the grain; the payment of an excessive mileage upon the private car which conveys the property of the owner of the car. Our investigations leave no room for doubt that all these methods are at the present time more or less resorted to for the purpose or with the effect of preferring one shipper to another.

It has been suggested that the Congress should prohibit railways from employing any agency or using any facility in the transportation of property which is furnished by the owner of the property. We should hesitate to recommend at this time so drastic a measure as that. Assuming that such a law would be a constitutional exercise of authority, it would seriously interfere with property rights which have grown up under the present system. Moreover, *there are many instances in which the service can be rendered or the facility furnished more advantageously both to shipper and railway and without injury to the public if provided by the shipper himself.*

> We do think, however, that *the Commission should be empowered* in a case of this kind *to determine whether the allowance to the property owner is a just and reasonable compensation* for the service rendered *and to fix a limit* which shall not be exceeded in the payment made therefor. Such a remedy would not be altogether adequate, and any remedy is extremely difficult of application, but nothing better appears to be available."

However much the Commission may now be of the opinion that shippers should not be permitted to receive allowances out of published freight rates for services in moving loaded cars from loading points to carrier's right of way or from carrier's right of way to unloading points as part of a continuous transportation service by railroad, it is without authority to forbid such allowances unless and until Congress amends the Act to so provide. In 1905, the Commission was of opinion that prohibition of such allowances was inadvisable and so it recommended legislation authorizing the Commission to keep allowances reasonable. That legislation was enacted in 1906. Congress, not the Commission and not the courts, has power to repeal or amend that legislation. The Commission orders here under consideration are administrative repeals of paragraph (13) of Section 15 and are void.

BROAD PROVISION OF SECTION 15, (13).

The language of paragraph (13) of Section 15, enacted pursuant to the foregoing suggestion of the Commission, is as follows:

> "If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint or on its own initiative, determine what is

> a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentalities so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for under this section."

While this section does not necessarily require payments of allowances, it is clearly a recognition of the propriety of reasonable allowances for work done or facilities furnished by the owner of the goods shipped and a grant of authority to the Commission of power to regulate, but not abolish, such allowances.

CASES WHEREIN COMMISSION HAS AUTHORIZED OR REQUIRED SECTION 15 ALLOWANCES.

The cases are quite numerous in which the Commission has recognized the propriety of the practice by authorizing, and sometimes requiring, the establishment and payment of spotting allowances to industrial companies in varied lines of manufacturing. There are also many decisions in which it has fixed allowances (divisions) to incorporated industrial railroads out of the regular freight rates and thereby has given the industrial company owning the terminal railroad the result of spotting service under the regular rates. (An example involving oil rates from a refinery is *Bay Terminal Railroad Case*, 58 I. C. C. 680).

PRACTICE OF ALLOWANCES TO SAWMILLS INITIATED BY THE COMMISSION.

In the present litigation and in view of the condemnation of the allowance to the Great Southern Lumber Company, by the report, 209 I. C. C. 793 (R. 90), under review in No. 317, it is of peculiar significance that the

practice of allowances to sawmills was initiated by the Commission itself in its decision in *The Tap Line Case,* 23 I. C. C. 277.

We quote the following, beginning at the foot of page 293 of that decision:

> "In all cases it is apparently the practice of the trunk lines, where no allowance is made, to set the empty car at the mill and to receive the loaded car at the same point. Indeed, they do this in many cases even when an allowance is made to the tap line. But whenever this service is performed by the trunk line, it is included in the lumber rate and is done without additional charge. In some instances the switch or spur track connecting the mill with the trunk line is as much as 3 miles long. In other words, by their common practice the public carriers interpret the lumber rate as applying from mills in this territory apparently as far as 3 miles from their own lines. So far as the manufactured lumber is concerned, it may therefore be said that where a mill has a physical connection with a trunk line and is not more than 3 miles distant the transportation offered by the trunk line commences at the mill. If, therefore, a lumber company, having a mill within that distance of a trunk line, undertakes, by arrangement with the trunk line, to use its own power to set the empty car at the mill and to deliver it when loaded to the trunk line it is doing for itself what the trunk line, under its tariffs, offers to do under the rate. In such a case the lumber company may therefore fairly be said to furnish a facility of transportation for which it may reasonably be compensated under section 15 whether its tap line is incorporated or unincorporated. In other words, the lumber company thus does for itself what the trunk line does with its own power at other mills without additional charge and what it must therefore do for the particular lumber company without additional charge. Under such circumstances we think the lumber company, under section 15, may have reasonable compensation when it relieves the trunk line of the duty."

It will be noticed that the Commission broadly ruled that the lumber rates in the South apply from the loading points at all sawmills situated on rails (within 3 miles of the trunk lines), regardless of the ownership of the rails. To avoid unjust discriminations it further held that the railroads should accord allowances to shipper-sawmills so that they would be on an equality with mills served by incorporated tap-lines; the latter *receive divisions out of the lumber rates*, as the result of this Court's decision in *The Tap Line Cases, supra.*

There were numerous subsequent decisions dealing with incorporated tap line railroads in southern lumber territory, wherein the Commission approved divisions to such railroads whereby the flat lumber rates apply from the loading platforms of the sawmills affiliated in ownership with the tap line railroads. There are few reported decisions approving allowances to lumber companies under paragraph (13) of Section 15, for the simple reason that the Commission adopted the practice of dealing therewith by supplemental orders entered in the *Tap Line Case* and not reported in its bound volumes of decisions. Numerous such orders approving allowances for switching cars from sawmills in southern territory are referred to of record herein:

> *C. E. Perkins,* Vice President, Missouri Pacific, testified that in making allowances to lumber companies they followed the Commission's decision in I. & S. 11 and made each allowance strictly in accordance with the principles laid down in that decision. (Or. Tr. 6326)
>
> *W. A. Rambach,* Assistant to the Vice President, Missouri Pacific, testified to Commission approval of allowance to Fisher Lumber Corporation, in accordance with findings in I. & S. 11. (R. 176)
>
> He testified that all of these allowances were made in accordance with I. & S. 11, which covered the entire lumber situation in southwestern territory. (R. 170)

Allowance at Glenmora, Louisiana, was approved by the Commission. (Or. Tr. 5023)

Allowance to Caddo River Lumber Company was submitted to the Commission and approved. (Or. Tr. 5135)

Allowance to Chicago Mill & Lumber Company was approved by the Commission, also to R. H. Brown Lumber Company. (Or. Tr. 5278) In fact, all of these lumber allowances apparently were approved by the Commission and they were established under the Commission's decision in I. & S. 11. (Or. Tr. 5280)

Allowance to Wisconsin-Arkansas Lumber Company was authorized by Commission. (Or. Tr. 5312)

F. A. Key, Jr., Traffic Manager, Louisiana & Arkansas Railway, referred to I. & S. 11, as the foundation for their allowances to lumber companies. (R. 180)

J. S. Hershey, General Freight Agent, Santa Fe Lines, referred to I. & S. 11, as the authority for initiating allowances to lumber companies. (Or. Tr. 5569)

J. A. Lynch, General Freight Agent, Texas & Pacific Railway, testified to the same effect. (Or. Tr. 5979-81)

INITIATION OF SPOTTING ALLOWANCES TO OIL REFINERIES.

While there are no formal cases in which the Commission required the initiation of spotting allowances to petroleum refining companies, like *The Tap Line Case* which dealt with sawmills, yet the allowances accorded by the carriers to several of the oil refineries were considered by the Commission and at least tacit approval thereof was obtained before these allowances became effective.

The discussions or so-called negotiations which preceded the establishment of allowances to the various industries here before the court are fully covered by the testimony and will be discussed in Part II hereof.

The matter of these allowances to Texas companies was

submitted formally to the Railroad Commission of the State of Texas, which issued its formal approval of the allowances. This was after public hearing; and the Commission's order is of considerable significance. (Exhibit No. A-74; R. 399.)

There are other refineries not involved in the cases here under review, as to which there were formal proceedings before the Commission notably the Standard Oil Company of Indiana as to its Whiting refinery and the Sun Oil Company as to its refinery at Marcus Hook. See pages 11 and 16 of this brief.

The record before the court contains copies of the correspondence in 1926 between the officials of the Southern Pacific Lines and The Celotex Company, on the one hand, and the Secretary of the Interstate Commerce Commission, on the other, wherein the Commission was fully advised of the proposed allowance to this industry before it was published by the carrier and accepted by the industry. (R. 481-92) The Commission gave its tacit approval thereto. We quote from the letter written October 13, 1926, to the carrier by the Secretary of the Commission:

> "In further reply to your letter of September 25, having reference to a proposed allowance of $1 per car to the Celotex Company for interchange switching between its plant near Marrero, La., and the junction.
>
> Under section 15 of the Interstate Commerce Act, provision is made for payment to the owner of property transported for any service he may render, directly or indirectly, connected with the transportation, the charge and allowance therefor to be no more than is just and reasonable.
>
> While section 6 of the act does not in express terms require the publication of allowances made to shippers under section 15, yet the Courts have held that allowances made to a shipper, even though reasonable in amount, are unlawful rebates unless published. Therefore the Commission has required tariff publication of all allowances made to shippers under sec. 15."

The foregoing statements are in accordance with the law. And in thus openly and candidly establishing an allowance, which the Commission now condemns as though it had been a secret rebate, the parties were following the precedent created as to sawmills by the Commission's requirement in the *Tap Line Case, supra.*

IV.

To support a cease and desist order, quasi jurisdictional findings of fact by the Commission are essential; and these are lacking in the present cases.

In the brief for appellants, the provisions of the Transportation Act, 1920, are cited and heavily relied upon to support the whole course of the Commission in this general investigation. There is no provision in that Act which tends to support the orders here in question. Conceding, as we do, that the Transportation Act stated new responsibilities and conferred new duties and powers on the Commission, and among other things, contained particular references to wasteful practices and economical measures, yet that Act did not contain any new provision changing the law with respect to the requirement that to support any cease and desist order having to do with the rates and practices of the railroads, findings by the Commission were essential that the present rates or practices were in some particular respect unjust and unreasonable, or unduly prejudicial or otherwise in violation of the prohibitions of the law.

The Commission's power to require the carriers to cease and desist from a practice is dependent upon the existence of some violation of the law.

It is only under paragraph (1) of Section 15 of the Interstate Commerce Act that the Commission enjoys

broad power to order carriers to cease and desist from unlawful practices.[15] It is there provided:

> "That whenever, * * * after full hearing under an order for investigation and hearing made by the Commission on its initiative, * * * the Commission shall be of opinion that any * * * practice whatsoever of such * * * carriers * * * is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered * * * to make an order that the * * * carriers shall cease and desist from such violation * * *."

The language of that statute is plain and unambiguous and the obvious purpose of it was, as so often has been held by the Court, to empower the Commission to correct abusive practices and prohibit specific violations of the law. This power unquestionably extends to the practice of making allowances and, if such practice is in any case violative of the Act, the Commission has power to require the carrier to cease and desist therefrom.

Just as plainly, however, this statute does not empower the Commission to prohibit a practice unless it is unlawful. And, as to the practice of making allowances, it is plain from paragraph (13) of Section 15 that such a practice is not unlawful *per se* and that the Commission has no power to abolish the practice, as such. These propositions are not disputed by anyone and it is apparent from the main report of the Commission that the Commission itself recognizes their validity. 209 I. C. C. 11.

But there is a complete inconsistency between what the Commission said and what it did in the particular orders here assailed; and it is apparent that the Commission's action in these cases was not taken on the ap-

[15] See authorities cited on p. 20, *supra*.

plied theory of paragraph (1) of Section 15. As we will show *infra*, these cases demonstrate beyond a doubt that the Commission was really proceeding to abolish allowances, on the sole theory that they were detrimental to the railroad revenues. This theory does not meet the test of paragraph (1) of Section 15, but is in reality a usurpation by the Commission of the legislative power.[16]

THE COMMISSION'S FINDINGS ARE ERRONEOUS AND INSUFFICIENT IN LAW.

Typical of all the cases here under consideration are the Commission's findings:

1. That the interchange tracks are reasonably convenient for receipt and delivery of interstate carload freight;

2. That no service is performed beyond the interchange tracks which the railroad is obligated to perform;

3. That the service performed by the industry is a "plant service";

4. That the allowances provide the means by which the industry enjoys a preferential service not accorded to shippers generally and receives a refund of a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of paragraph (7) of Section 6 of the Interstate Commerce Act.

The apparent theory of these findings is that the practice of the carriers at these industries was violative of paragraph (7) of Section 6. As we have seen, (p. 43, *supra*), this is a clear error of law.[17] Section 6 deals

[16] It is significant that the Commission was urged by the Director of Service, who conducted the hearings, to "recommend to the Congress repeal or modification of Section 15 (13) of the Act, under which such allowances are made." It did not do so, but instead, bottomed its action in these cases on paragraph (7) of Section 6.

[17] See authorities, p. 22, *supra*.

only with the subject of the published tariffs of the carriers and the requirement of paragraph (7) of that section is simply that a carrier shall not charge a different compensation for transportation than that named in the tariffs and that it shall not refund or remit any portion of the rates so published or extend any privilege not so published. Therefore no violation of paragraph (7) of Section 6 could be found unless it was found also that something was being done that was not provided for in the tariffs. The Commission did not so find in these cases and, of course, it could not have done so because in every case the tariffs were complied with.[18]. Indeed in the Commission's current theory of the case paragraph (7) of Section 6 would be violated if the allowances had *not* been paid.

Aside from this expressed reference to Section 6, which is a manifest legal incongruity, as this Court has held, it is also apparent upon analysis that the Commission's findings as a whole are insufficient in law. Indeed if these were suits by the Commission seeking to enforce its orders the fact stated would be demurrable. In other words, the findings as a whole do not demonstrate any unlawful practice which the Commission might require the carriers to stop.

THE FINDINGS POINT TO NO ILLEGAL PRACTICE.

When the findings are analyzed (as has often been done in other cases by this Court), to determine what the Commission's theory of the case was and whether that theory was one which might support a cease and desist order, it is to be noted at the outset that the findings are

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[18] In the *Great Southern Lumber Company Case*, the tariff was not issued until after the Commission's order; and this is fully developed in Part 2 hereof, pages 130-1, *infra*.

not clear and specific, but are rather ambiguous and mutually inconsistent.

As a whole, the findings amount to a single conclusion of law, *i. e.*, that the railroads are not obligated to perform the service beyond the interchange tracks at these particular industries. The ambiguity of the findings lies in their failure to indicate which of two possible bases the Commission had in mind when it arrived at that conclusion. For it is well settled, as the Commission recognized in its main report, that the legal obligation of the carrier ordinarily extends to moving the cars from and to the points of loading or unloading; and that obligation terminates *either* at a reasonably accessible point for loading and unloading *or* at the first point where the carrier encounters a substantial interruption or interference with its operation in performing the service of placing the car for loading or unloading.

The first of the above findings seems to suggest that the Commission thought the obligation ended at the interchange tracks because they represented reasonable points for loading and unloading. They did not explicitly so find, however, and no inquiry was made as to the possibility of using the interchange tracks for loading and unloading points. Moreover, it would be a manifest absurdity so to find, in view of the complete physical impossibility of loading tank cars of petroleum anywhere but at the loading racks.[19] Apparently this finding was

[19] The interchange tracks are not adjacent to any piping facilities for loading or unloading tank cars of petroleum. The Consolidated Freight Classification governing all railroad tariffs of freight rates, provides a general rule that the principal petroleum products (excepting asphalt), when moving in tank cars

> "must not be shipped and will not be delivered unless consigned to parties accepting delivery on private sidings equipped with facilities for piping the liquid from tank cars to permanent storage tanks, or consigned to parties accepting delivery from railroad sidings where facilities exist for piping liquid from tank cars to permanent storage tanks."

inserted for good measure, or because the Commission's numerous supplemental reports follow a common pattern, which includes this particular recital. In any event it could only mean that the interchange tracks are reasonable points for interchange of cars between the carrier and the plant transportation system and that is not delivery.

Unquestionably the only basis upon which the Commission could have made its second, and broadest, finding was the second of the alternatives above named, *i. e.*, that the carrier's obligation terminated at the interchange tracks because the carrier was prevented from proceeding to complete the service of spotting the cars at a reasonably accessible point for loading and unloading by some interruption or interference from the industry. That is not the condition in any of these plants; and this is covered in Part 2 hereof. We shall deal with the validity of such finding upon the evidence below.

The third finding, in which the service beyond the interchange tracks is described as a "plant service" is only another way of saying that the carrier is not obligated to perform it. It adds nothing to the second finding above discussed.

Even assuming *arguendo* that the Commission correctly concluded that railroads were not obligated *at these industries* to place the cars at the unloading and loading platforms or racks, it is still no violation of law for the railroad to perform a greater service than the minimum which it is *obligated* to perform. For such a practice to be violative of the Act it would have to further be true that such practice is either (a) unreasonable under Section 1; or (b) unjustly discriminatory under Section 2; or (c) *unduly* preferential and prejudicial under Section 3.

No findings of unreasonableness, or of unjust discrimination, of or undue preference or unjust prejudice were made by the Commission as to any of the appellee industries; and it cannot, therefore, be said that the allowances published and paid at these industries are in any way in violation of the Act.

The last finding above mentioned, indeed indicates that the practice was being condemned as resulting in a "preferential service," but does not suggest that it was an *undue* preference. There was no clear finding to the effect that section 3, which prohibits undue preference and prejudice, was violated. Furthermore, if it was ever thought that section 3 was involved, that theory was not prosecuted, and there was no evidence sought or received upon the question of preference and prejudice, or upon the additional question as to whether such preference and prejudice were *undue*.

While it is plain that the Act contains no prohibition against a carrier's performing more than the minimum service which it is obligated to render, there is little affirmative authority in the reported cases establishing that the carrier may lawfully do so. This for the obvious reason that it has never before been suggested that the carrier's proper province of managerial authority was so limited. However, in *Pick-Up and Delivery in Official Territory*, 218 I. C. C. 441, the Commission clearly recognized the principle for which appellees contend. In that case the Commission approved the action of numerous carriers in extending their service on less than carload traffic to include store-door to store-door pick up and delivery with no plus charge therefor, although it was admitted throughout that, as the Commission said, p. 474:

> "a carrier cannot be required against its wishes to furnish personal or store-door delivery of freight, * * *."

If it is lawful for the railroad companies to go off the rails and perform the pick up and delivery service upon l. c. l. traffic even though there is no obligation to do so, it is surely lawful to deliver carload traffic at the customary point of loading and unloading on rails accessible to their engines, even though the legal obligation to do so is destroyed by a technical interference or interruption.

V.

There is no evidence tending to support the Commission's conclusions.

The court below, with the entire record before it, and with full opportunity and time to study and examine that record, reached the conclusion that there was no substantial evidence to support the Commission's findings or conclusions. (R. 175)

When it is suggested that the utmost respect must be accorded the conclusions of fact of the Commission, on the ground that its members are well informed by experience and enlightened by their store of knowledge of transportation matters, it should be considered that no member of the Interstate Commerce Commission sat at any of the sessions in this broad investigation in which was taken the voluminous testimony reproduced in twelve large printed volumes. The members of the Commission had to place great dependence on their staff; and while this is no criticism or ground for rejecting their conclusions of fact, it perhaps explains the obvious inconsistency between the Commission's well considered and, on the whole, restrained main report and the extreme and unwarranted lengths to which the supplemental reports and orders go. The learned judges of the court below, with the same voluminous record before them, had the benefit of the suggestions of counsel for

both sides as to what this record contains. In the lower court, as here, counsel for appellee industries offered many specific references to the record as supporting various contentions of fact and as warranting the affirmative findings of the court. On the other hand, obviously counsel for appellees could not cite specific record references in support of our assertion that the record contains no evidence to support certain conclusions of the Commission. In that situation the lower court was entitled to the benefit and aid of specific citations by government counsel of testimony or exhibits which constituted substantial evidence of violations of the Act. There were offered in the court below, as here, many suggestions of things appearing of record; but they do not even tend to establish facts constituting violations of the Act.

We have seen that as a matter of law, for the Commission's findings to be correct that the carriers were not obligated to perform the work of switching and spotting cars, it would have to be found that there actually was some interruption or interference of the service within these particular industries such as is necessary to restrict the carrier's legal obligation to deliver the car. This, within the Commission's own definition, 209 I. C. C., at p. 44. There is no such evidence in the record as to any of these industries; none of the evidence in the record tends to establish that such interference or interruption actually exists in these industries; and any implication that might be inherent in an examination of such evidence as maps of the plant track layout is foreclosed by definite uncontradicted affirmative testimony in the record to the effect that no such interruptions were encountered at these plants.

For illustration, the particular findings in the sixteenth supplemental report, 209 I. C. C. 394, dealing with the

Destrehan refinery,[20] are in words and figures as follows (R. 54):

> "We find that the interchange tracks at this plant are reasonably convenient points for the delivery and receipt of interstate shipments of carload freight; that the Mexican Corporation performs no service beyond such points of interchange for which the respondent carrier is compensated in its interstate line-haul rates; and that by the payment of an allowance respondent carrier provides the means by which the industry enjoys a preferential service not accorded to shippers generally and refunds or remits a portion of the rates or charges collected or received as compensation for the interstate transportation of property, in violation of section 6 (7) of the Interstate Commerce Act."

We have discussed the legal import of these findings, page 55, *supra,* and in view of the fact that they do not suggest *undue* preference and prejudice, *unjust* discrimination, or unreasonableness, and appellants do not argue the presence of any such violations of the Act, we shall not discuss the evidence of record from this standpoint. To do so would be idle. We propose to meet appellants squarely upon the sole proposition which is presented in support of the orders which the Commission has entered, and will discuss the record from that standpoint.

These formal findings, although varying slightly in the individual reports, all boil down to the single proposition, *i. e.,* that the service beyond the interchange point allegedly is one which the carrier is not obligated to perform under the established freight rate; and this amounts to a conclusion of law, which in each individual case would

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[20] The Destrehan refinery is owned and operated by Pan American Petroleum Corporation, appellee in the title case under No. 514, being successor to the Mexican Petroleum Corporation of Louisiana, Inc., named in the Commission's order. This industry and these findings are referred to as illustrative in the brief for appellants, pp. 19-21.

be dependent upon the existence of facts operating so as to restrict the carrier's obligation. Query: Does the record of evidence bearing on this Destrehan refinery, for example, disclose that there is substantial interruption or interference, or such disability as would relieve the railroad's obligation to originate and deliver freight at the loading and unloading points and mark the so-called interchange points as the limit of its obligation? The appellee asserts that there is no substantial evidence along any such lines and that being the case, the general rule would operate as stated in repeated decisions of this Court, and as recognized in the main report of the Commission, 209 I. C. C. 11, where the test is stated in these terms:

> "1. When a carrier is prevented from performing an uninterrupted service to the points of loading or unloading within the confines of an industrial plant because of some action or disability of the industry or its plant, the carrier's duty with respect to the delivery or receipt of cars does not extend beyond the point of interruption or interference, and any allowance to the industry for performing the service beyond such points or the performance of service by the carrier beyond such points without proper charge is unlawful in violation of section 6 of the act."

The further language, on p. 44 of the decision, is:

> "When a carrier is prevented at its ordinary operating convenience from reaching points of loading or unloading within a plant, without interruption or interference by the desires of an industry or the disabilities of its plant, such as the manner in which the industrial operations are conducted, the arrangement or condition of its tracks, weighing service, or similar circumstances, * * *."

In asserting that there is no substantial evidence of the existence of such conditions at the Destrehan refinery,

or at any of the plants of appellees, we do not contend for a restricted meaning of the "substantial evidence" rule. We do not assert that substantial evidence necessarily means direct evidence, in the sense of testimony of witnesses expressly asserting the presence of interference or of conditions of interruption in so many words. We concede that the Commission, being an expert body, would be justified in drawing reasonable inferences from facts shown by substantial evidence; but it is not justified in any implications which are directly contradicted by all of the affirmative evidence. We do contend that there are no evidentiary facts on the record from which it reasonably could be inferred, even with the aid of expert knowledge, that there does exist any interruption or interference or disability in the Destrehan refinery by which it might be reasonable to hold that the interchange tracks constitute reasonable points for originating or delivering carload freight.

The fact that the locomotive working in the Destrehan refinery, for example, may be equipped with a *spark arrester,* from which it might be inferred that there is some risk of fire, proves nothing; for there is an abundance of evidence that carrier-owned and operated locomotives are quite commonly equipped with spark arresters, when performing common carrier transportation services in other refineries generally, around sawmills, in the forests, etc.

The fact that there may be several miles of track in this refinery or that a locomotive is constantly on duty means nothing, for there is an abundance of evidence that this is true at numerous industries where the carriers are performing transportation services under their admitted obligation. As the Commission well said in *Car Spotting Charges,* 34 I. C. C. 609:

"The mere size or complexity of the industry is not controlling in determining whether or not the line-haul rate covers the receipt or delivery of freight at the door of the plant. The service involved in the placement of cars for loading or unloading at an isolated industry to which a single spur leads may be as great as that rendered in the placement of cars for loading or unloading in a large plant having an intricate system of interior tracks. Indeed, there is testimony tending to show that by reason of greater density of traffic and greater tonnage the cost of spotting at the larger industries is less per car than at the smaller industries."

The Commission further said in the *Car Spotting Charges case*, at page 618:

"There may be cases in which the spots at which cars are placed for loading and unloading in complex industries are so located that the request for the receipt and delivery of carload freight at such spots could not, in view of general usage, be regarded as reasonable, and where a charge for the spotting service in addition to the line-haul rate might therefore be justified, but the mere fact that an industry is complex, or that it requires an interplant service in addition to the receipt and delivery of carload freight, is not sufficient to justify an additional charge for the placing of cars at the door of the industrial plant for the receipt or delivery of carload freight. The line-haul rate, however, covers only one placement of the car for loading or unloading, and an additional charge should be made for each additional placement of the car for that purpose."

In Part 2 of this brief, the circumstances and the record as to all of the plants of the various appellees is reviewed in some detail. This includes the Destrehan refinery.

It may here suffice to point out six circumstances which are established by affirmative uncontradicted evidence relating to the Destrehan refinery, for illustration:

First, the published tariff (R. 454) wherein the Yazoo & Mississippi Valley Railroad provides for the allowance specifically defines the work for which the carrier is paying the Destrehan refinery as that which "consists of the handling of the cars between the point of interchange of such cars with this company and the point at which such cars are unloaded, or the point at which such cars are loaded in said plant". It further recites that this terminal switching service is performed "for the account" of the railroad. There is neither testimony by way of opinion nor of recitals of facts to rebut the affirmative showing of the tariff itself as constituting an admission that the "terminal switching service" is within "the assumed obligation" of this carrier under the rates.

Second, in establishing the allowance to the Destrehan refinery, the carriers made a cost study which was on the regular C. F. A. formula, which was closely followed and which expressly provides that no allowance shall cover any service beyond points where interference or interruption is encountered (R. 51); that point of interference or interruption is where the railroad's obligation as a carrier under the established freight rates terminates.

Third, there is no substantial difference in circumstances and conditions as between those at the Destrehan refinery, receiving an allowance, on the one hand, and those at the adjacent Norco refinery of the Shell Petroleum Company, where the carriers have at all times performed switching and spotting services under the freight rates, on the other hand; and no question has been raised of the propriety of that practice at Norco.

Fourth, the conditions in both the Destrehan and the Norco refineries are substantially similar to conditions at refineries generally; at all refineries and bulk oil ter-

minals, the railroads include the switching and spotting services under the freight rates, without anywhere terminating their obligation at interchange tracks.

Fifth, there are no so-called public team tracks anywhere in the vicinity of Destrehan or Norco and there is no movement of petroleum to or from public team tracks so that the test would be wholly inapposite as to whether the service beyond the interchange tracks would exceed the equivalent of "simple team track placement".

Sixth, the freight rates on petroleum from Destrehan and Norco were established by the carriers and fixed by the Commission in various cases wherein there was no recognition of any divorcement of terminal services from line-haul transportation or any thought of limiting the transportation obligation to the interchange tracks instead of to the loading or unloading points in the refineries.[21]

The same features are present as regards all nine of the underlying cases involved in these appeals. These affirmative features of the proof we respectfully submit foreclose or destroy any basis for drawing inferences from mere maps or charts or statistics of volume of business. The facts appearing in such features of evidence lend themselves just as readily to the conclusion that the allowances are in every sense proper and cover uninterrupted terminal services within the carrier's obligation.

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[21] In any of these petroleum and lumber rate cases, it would have been possible for the Commission to stipulate that the rates prescribed or found reasonable were for conveyance or line-haul and did not cover terminal services at the refineries. This it did with respect to iron ore rates in the *Iron Ore Rate Cases*, 41 I. C. C. 181, at p. 219, wherein special reference was made to the exemption of the terminal *placement services* from the established rates. No similar expression or action is found in any other rate decisions of the Commission.

There is no evidence of any illegality of the practices at these industries.

We have suggested some of the possible unlawful features which, if true, might justify and support a cease and desist order. But it will be noticed that counsel for appellants have cited no evidence in the record as to any of these industries, which, when carefully scrutinized, is indicative of any of these possible violations of the law.

There is no evidence and no suggestion of evidence of any secret or unpublished rebates. There is no evidence and there are no findings by the Commission purporting to condemn any unjust discrimination or undue preference or unjust prejudice or unreasonableness in the allowances in question. On the other hand, there is abundant evidence that the allowances paid these industries are less than the cost to them of performing the services in question; and that these costs relate to services coming squarely within the definition of carrier obligation embodied in the so-called central freight association terminal allowance formula.

That formula, it may be said in passing, was adopted by the carriers to conform to the Commission's decisions entered from time to time in cases approved by this Court.

In Part 2 of this brief, the evidence is reviewed in detail as bearing on the circumstances relating to the Commission's specific findings at each of these industries, and the presence or absence of any conditions of interruption or interference according to the general rule stated in the Commission's main report.

VI.

The circumstances of these cases distinguished from United States versus American Sheet & Tin Plate Company.

It will be remembered that the appellants recently presented a motion, through the Solicitor General, for summary reversal of these causes, without argument. To this motion appellees filed their reply; and the motion was overruled by order entered January 3, 1938.

In that motion, the appellants relied entirely on the decision of this Court in *United States* v. *American Sheet & Tin Plate Company, supra.* Their position was that the present cases arise under the same investigation by the Commission; that the same identical questions arise as were decided by this Court; and therefore it was urged that there was no occasion for the delay and expense or for consuming the time of this Court with briefs and oral arguments and that the Court should summarily reverse the decrees below. In that motion, however, the appellants recognized that the decision in the *American Sheet & Tin Plate Company case,* did not decide:

> "the question whether the record contains sufficient evidence concerning the several plants of the appellees to support the orders."

They suggested that it could be readily ascertained that there is ample evidence of record to support the orders simply "by turning to the following pages of the transcript of record in the cases at bar."

It is somewhat difficult, without simply flatly contradicting opposing counsel, to prove the assertion that there is no substantial evidence in this voluminous record to support findings essential to the validity of the Commission's orders. It would seem, however, that the appellants, having asserted that the decrees of the court below

are erroneous, should bear the burden of pointing specifically to evidence of record thought by them to sustain the Commission's orders assailed herein.

In view of the plain language of the statute, it can hardly be contended that any published allowance which may be brought into question is *prima facie* unlawful. Simply because the allowances involved in *American Sheet & Tin Plate Company case* were found to be unlawful, it does not follow that any and all independent orders of the Commission condemning allowances at other industries must be affirmed simply because they are found to be in the same language as that employed in *American Sheet & Tin Plate Company cases.* This will be discussed fully, page 73, *infra,* in reply to appellants' brief.

Without re-arguing the former cases, it will suffice here to say that the underlying circumstances with respect to the iron and steel rates and the methods of terminal operations at iron and steel plants are, or for all that was said in *The Pittsburgh cases* may be, substantially different than the circumstances as to lumber and petroleum rates and the conditions at sawmills and refineries. Certainly as to the particular refineries and sawmills here before the Court, the record fails to establish any facts indicating that the circumstances of these cases are the same and therefore that the decision in *American Sheet & Tin Plate Company cases* must govern here.

If the Commission meant what it said, in the language referred to with approval by this Court,

> "The Commission properly held that each case must be decided on the circumstances disclosed,"

then it can hardly ask that the final decision in certain northern iron and steel cases shall be used as a rubber stamp approval in these southern lumber and petroleum cases where the individual circumstances and the evidence are totally different.

VII.

Reply to brief for appellants.

In the foregoing argument we have proceeded upon the theory that the Commission, in entering the orders which the lower court set aside, was exercising, (without requisite findings, or supporting evidence), its undoubted power under paragraph (1) of Section 15 of the Interstate Commerce Act to execute and enforce the provisions of the Act. This power is broad indeed, and, if properly exercised, would amply support the type of order which the Commission has entered in these cases. We submit, however, that the Commission had no thought of exercising that power, in the prescribed manner, and for the purpose of correcting legal abuses; rather it conducted an investigation under sections 12 and 13, with the preconceived plan of doing whatever it could to help the railroad situation. We submit that a commendable motive cannot enlarge the statutory power or set aside limitations on such power.

It is stated in the brief for appellants, (p. 7), in discussing "The Commission Proceeding" that

> "The Commission's investigation was undertaken under Section 13(2) of the Act, which, *inter alia*, empowers the Commission to institute proceedings on its own motion as to any matters concerning which a complaint is authorized, 'or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act.' Section 12(1) of the Act authorizes the Commission to inquire into the management of the business of the carrier, imposes upon it the duty to keep itself informed as to the manner and method in which the same is conducted, and provides that 'the Commission is hereby authorized and required to execute and enforce the provisions of this Act.'"

The sections of the Act above referred to form the basis for the inquisitorial powers, which are the legal foundation of the Commission's power under paragraph (1) of Section 15 to issue cease and desist orders. (They do not enlarge or broaden the powers, stated only in paragraph (1) of Section 15, as regards entering cease and desist orders.) The quoted reference to these sections of the statute indicates that the Commission's theory of the case viewed their action as an application of those sections. But actions speak louder than words; and the Commission's action in these cases belies any verbal reference to these sections of the Act. For, we submit, it is inescapably true that the Commission did not confine itself to the enforcement of any of the provisions of the Act. It did not inquire into the possibility of violation of Sections 1, 2, or 3 and no evidence was received on the issues of reasonableness, unjust discrimination, or undue preference and prejudice, such as would have been germane to an investigation into a suspected violation of these sections of the Act. On the contrary, the Commission's action indicates conclusively that the Commission believed that its power transcends the limitations imposed in paragraph (1) of Section 15, and that somehow it was authorized to issue cease and desist orders directed against any practice which, though perhaps not illegal, had an adverse effect on carrier revenues or expenses and consequently upon the transportation system of the nation. Indeed, the very name of the proceedings which resulted in the invalid orders branded it as a pure "revenue" case.

In appellants' brief, counsel further demonstrates the Commission's applied concept of its power as something more than that conferred by paragraph (1) of Section 15, and also reveals further that what the Commission was

trying to do in these cases was not to execute or enforce the provisions of the Act, but rather to solve the "transportation problem". Referring to the Transportation Act, 1920, as having made important changes in the Interstate Commerce Act, counsel further state (pages 15-16) that:

> "But the 1920 Act sought also to insure an adequate and efficient national transportation service. This was to be accomplished in part by direct instructions to the Commission to fix rates that would 'as nearly as may be' yield adequate revenue and a fair return to the carriers. (Sec. 15a(2).) However, the desired result of an efficient national transportation service at rates, both just to carriers and reasonable to shippers, could not be obtained simply by raising rates and, accordingly the new regulatory policy was in large measure directed to the prevention of waste, principally waste of a kind growing out of the carrier's competition with each other. * * * The Commission's investigation in Ex Parte 104 into practices adversely affecting operating revenues is in the nature of a companion case to *Ex Parte 103, Fifteen Per Cent Case, 1931, supra,* and is there referred to (pp. 585, 586)."

Thus in the very defense of its orders, is the admission that what the Commission was really doing in Ex Parte 104, was not to prohibit any unreasonable or otherwise unlawful practice, but rather to augment the carriers' revenues by declaring that the service which the railroads could render for the established rates must henceforth be restricted.

We submit that there is no justification in the Interstate Commerce Act for this action and that it is contrary to the express provisions therein.

True, paragraph (2) of Section 15a directed the Commission to consider the need of the carriers for revenues, "*in the exercise of its power to prescribe just and rea-*

sonable rates.'' It can hardly be urged with force, however, that this mandate gave the Commission *carte blanche* authority to take any and all steps which it might conceive to augment carrier revenues. This provision did not enlarge the Commission's power to prohibit an illegal practice and does not justify the Commission's prohibition against the allowance practice at these particular industries, in the absence of any violation of the provisions of the Act. On the contrary, for the Commission to prohibit an otherwise lawful allowance on the sole grounds that it had the effect of depleting carrier revenues would be in effect to repeal paragraph (13) of Section 15, by which Congress expressly provides for such allowances. Congress enacted that paragraph on the recommendation of the Commission, and if the Commission now is of the opinion that allowances generally are unwise, or that it should have the power to limit the service which the railroads may perform without regard to any other consideration than the carriers' need for revenues, it should so recommend to the Congress.

Under the Interstate Commerce Act as it now stands, it is not unlawful for a carrier to render a greater service than the minimum which it is legally obligated to perform. The Commission in one other important case, at least, has tacitly recognized this. *Pick-Up and Delivery in Official Territory,* 218 I. C. C. 441. And if an allowance is published in a tariff which conforms to law, it is not unlawful, in the absence of unreasonableness, undue preference and prejudice, or unjust discrimination, even though the service involved was one the carrier was not obligated to perform, without charge therefor. So that, assuming that all the facts that the Commission found were true, they would not be a proper basis for the cease and desist orders entered.

THE PITTSBURGH CASES.

In support of the proposition that the findings of the Commission in these cases are sufficient to support the orders made, appellants cite *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, the *Pittsburgh Allowance Cases*. They urge that the same findings were made in these cases and that, therefore, the decision in the Pittsburgh cases, which had the effect of approving the Commission's action there, must likewise be determinative of the question as to the legal sufficiency of the Commission's action in these cases, as supported by its findings.

It is perhaps true that the action of the Commission in those cases was founded upon no different basis than the propositions found by it in respect of the industries, appellees herein, *i. e.*, that the carrier's service of transportation ends at the interchange tracks and that the spotting of cars beyond that point is not a service which the carrier is obligated to perform. We have argued above that the prohibiting orders issued on that foundation alone were based upon a misconception of the law, namely the erroneous theory that it is *unlawful per se* for a carrier to perform more than the minimum of service. The fundamental error in that concept lies in the failure to distinguish between what a carrier may be *required* to do because legally obligated, and what it may be *prohibited* from doing because unlawful. This is a distinction which has been repeatedly demonstrated, if not expressed, and it has never before been contended that a practice was unlawful, simply because the carrier could not be forced to put it into effect.

The cases cited by appellants as supporting this theory that spotting, or allowance therefor, is unlawful if

not supported by a special consideration, really hold only that the carrier may not be *required* to pay an allowance for which there is not the consideration of a legal obligation to perform the service. Thus, in the *General Electric case,* the shipper's demand for an allowance was refused by the carrier, and that refusal upheld by the Commission, and this Court, there being no obligation on the part of the railroad to perform the service. But it is one thing to refrain from imposing an obligation on a carrier, and quite another thing to prohibit the carrier from assuming the duty. That case did not establish the proposition that the carrier *could not* lawfully perform the service, or pay the shipper to perform it.

We submit that the opinion of this Court in the *Pittsburgh cases* contains no disapproval of the proposition that a carrier may, in the management of its business, elect to perform a service, or extend a privilege, which it could not be required to offer, so long as it does not unjustly discriminate, or unduly prefer and prejudice, in violation of law. Whatever may be the necessary logical implication from the decision in those cases, we believe that the Court did not regard its opinion as the benchmark of a new doctrine, contrary thereto. Had the court so viewed its decision, it would undoubtedly have articulated that view in its opinion and would have held, unequivocally, that it is unlawful for a carrier to perform a service unless the compensation therefor is mathematically the equivalent of the value of the service. It was not there so held, and we respectfully submit that those cases are not authority for establishing the proposition here.

CUSTOM AND PRACTICE.

Appellants argue that the custom and practice of the carriers with regard to spotting services is not uniform. They discuss this point on a national basis, without regard to the commodities involved, but regarding only the question of whether allowances are uniformly paid, or the service performed, at all industries, by all carriers.

Furthermore, so to analyze the matter of custom and practice only in its broad general aspects, and without distinguishing between various types of industries, involves a complete disregard for the significance of the facts surrounding that custom *as they bear upon the issues in these cases.* For the presence or absence of a *universal* custom or practice goes to the fundamental issue as to whether the line-haul rates include compensation for the spotting service, for which the allowance is made; and the whole purpose of bringing that fact to attention is to show that the rates do include that service.

Rates are commonly made with a view to the commodity on which they apply, and the transportation characteristics, traffic evidence, or other facts pertaining to one commodity could hardly have any bearing upon the measure of a particular rate to be applied to another commodity. Thus, the extent of the service rendered under the rates on petroleum, or lumber, have no relation, insofar as the compensatory nature of the rate is concerned, to the service rendered under the line-haul rates on any other commodity. We submit that the important fact is that, as we have shown, lumber, petroleum, and paper board rates were all fixed, either by the carriers, or by the Commission itself, with the conscious purpose of including compensation for the whole service, beginning at the point of loading and terminating at the

point of unloading. The carriers admit it, the Commission's reports prove it, and it is nowhere denied by substantial authority. And the fact that no carrier has ever refused to do the work of spotting at any petroleum, paper board or lumber industry, is only a further affirmative demonstration of the common knowledge that there is full compensation for that service in the rates on those commodities.

Appellants, in further discussing this matter of custom and practice, refer to the testimony regarding the allowances paid, or services performed, by the Pennsylvania Railroad (p. 44). They note that allowances are paid at 59 industries; spotting is performed by the carrier at 833 industries; and 125 industries do the work without compensation.[22] These figures properly mean that at 892 industries the Pennsylvania performs or bears the cost of spotting as against 125 where it does not. For there is no legal difference between performing the service and paying an agent to perform it. Yet at page 46 of their brief, appellants characterize this as "a strange case of uniform custom and practice" because allowances are paid at 59 industries and not at 125. We submit that such a treatment of the statistics is grossly misleading and at best only serves to demonstrate further the erroneous theory of appellants that the practice to be investigated is the practice of making allowances, in the sense that such practice is to be divorced from the inseparable practice of performing the service.

The truth of the matter is that, while out of a total of over 1,000 industries only 125 sometimes do the work

22 We do not accept the statistics, for a careful check of the record indicates that very few of the 125 industries in this enumeration are actually doing the major part of the spotting work at their plants without compensation. There are included a large number of plants which sometimes spot the cars, with locomotive cranes or engines, but which have the benefit of conventional spotting service by the Pennsylvania Railroad as to most of their shipments.

of spotting without compensation, there was not one of those 125 industries at which the Pennsylvania refused to perform the service. At refineries, sawmills and board plants the facts are even stronger, as we have shown, *supra*, with the same absence of any instance in which the carrier has refused to perform the service.

IN CONCLUSION.

The statement in the brief for appellants is that the ultimate question for this Court is whether the lower court erred in holding that the Commission's orders were invalid; and with this we agree. Their entire brief proceeds, however, practically to ignore the opinion and action of the statutory three-judge court and to discuss the cases with greatest reliance on the doctrine that the orders and opinions of the Interstate Commerce Commission, a quasi-legislative tribunal, are entitled to profound respect, to the point of presuming that there is substantial evidence to support all findings and statements of fact. This, with no apparent recognition that it was the duty and function of the court below carefully to review the large Commission record, presented in full in support of the bills of complaint and prayers for relief therein. It is a fair presumption that the judges below were right, rather than wrong, in their findings and conclusions.

The labor of examining a large record, particularly one so voluminous as the twelve printed volumes sent up as originals under stipulation re record (R. 511, 557) would be a burden which this Honorable Court ordinarily ought not to be expected to bear or assume. In the search for some substantial testimony to support essential findings, it should have the aid of specific ref-

erences by appellants to affirmative testimony of such character and effect. This, we earnestly submit, is lacking as regards conclusions of fact establishing violations of the Act.

Separate chapters of the brief for appellants are devoted to condensed discussion of the facts relating to the individual industries of appellees. These chapters contain many erroneous statements and assumptions, not supported by the record.

In Part 2 of this brief (bound as a separate volume), we are submitting detailed review of the facts of record as to each of the plants of the appellees.

Respectfully submitted,

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Chicago, March 19, 1938.